IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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No. ...75-1797

COMMISSIONERS OF ELECTION OF UNION COUNTY, NAMELY: COMMISSIONER JOE WIX, COMMISSIONER WALTER VANDERFORD, COMMISSIONER HOWARD NELSON, COMMISSIONER WILBUR HODGE, COMMISSIONER BOBBY MAGNUM AND THE UNION COUNTY DELEGATION, REPRESENTATIVE JAMES ARTHUR, SENATOR JOHN D. LONG AND SENATOR ROBERT BLAKE, AND THE UNION COUNTY COMMISSIONERS, PETITIONERS,

versus

ROBERT LYTLE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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versus

ROBERT LYTLE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The South Carolina Attorney General, on behalf of the above-named petitioners, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on February 10, 1976.

OPINIONS BELOW

The opinion of the District Court for the District of South Carolina granting judgment for the respondent Lytle is printed in Appendix C hereto and reported at 65 F. R. D. 699. The opinion of the Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court for the District of South Carolina, is printed in Appendix B hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on February 10, 1976. *See* Appendix B. The petitioners' petition for rehearing and motion for rehearing *en banc* was denied by the Court of Appeals for the Fourth Circuit on March 15, 1976. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether 42 U. S. C. § 1973 *1*(e) should be construed to authorize an award of attorneys' fees in this case.

2. Whether "the Union County Commissioners" and Union County are "persons" within the meaning of 42 U. S. C. § 1983 and are, therefore, subject to liability for damages in the form of attorneys' fees.

3. Whether the eleventh amendment to the United States Constitution bars the recovery of attorneys' fees against state officials acting in their representative capacities.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fourteenth amendment to the United States Constitution and 42 U. S. C. § 1973 *1*(e) and 42 U. S. C. § 1983 are involved in this petition for a writ of *certiorari*.

STATEMENT

This suit arises under 42 U. S. C. § 1983. The basic facts are as follows:

On March 4, 1974, the respondent, a resident of Union Township in Union County, South Carolina, filed a complaint under 42 U. S. C. §§ 1983 and 1988 alleging that the townships of Union County were malapportioned and that this malapportionment denied the plaintiff equal suffrage under the fourteenth amendment to the United States Constitution. The gravamen of the complaint attacked the use of at-large Union County elections with a residency requirement that each candidate running for a seat on the Union County Board of Commissioners, the governing body of the County, reside in one of the eight townships. The respondent requested the abolition of all residency requirements. On March 29, 1974, the petitioners filed their answer and denied that Union County was malapportioned.

On April 5, 1974, the respondent filed a motion for summary judgment and an accompanying brief in support of that motion. On the same date the petitioners filed a motion for summary judgment and accompanying affidavits and a memorandum of points and authorities in support of their motion. The district court combined the instant case with the case of *McCain v. Lybrand*, an Edgefield County reapportionment case, whose first cause of action raised basically the same issues.

By an Order dated May 16, 1974, the district court granted the respondent's motions for summary judgment

in both cases and directed that all Union County township commissioners be elected at large without the imposition of a residency requirement upon any candidate. *See* Appendix G; *see also* 376 F. Supp. 304. The district court found that "very few courts have faced the exact issues raised in the instant cases" [*see* Appendix G at 59; *see also* 376 F. Supp. at 306] and, moreover, both the court and the parties were able to find at that time only three cases with identical factual situations, two of which held the apportionment schemes constitutional. The district court found for the respondent based on the decision in the third case, *Keller v. Gilliam,* 454 F. 2d 55 (5th Cir. 1972). *See* Appendix G at 65-69; *see also,* 376 F. Supp. at 309-11.

In an opinion filed on June 17, 1974, [*see* Appendix F; *see also* 509 F. 2d 1049], the Fourth Circuit Court of Appeals modified the decision in *Lytle* and reversed the decision in *McCain.* The Fourth Circuit declined to recommend abolishing residency requirements in Union County and ordered that a temporary plan be initiated that retained some residency requirements but tended to equalize the population variances through the use of "floating" representatives:

> To strike down completely all residence requirements would mean that the urban area of Union would completely dominate and control the Board, leaving the rural areas of the County without any representative to voice their peculiar and unique territorial interests. That was a result the legislature manifestly sought to avoid. In decreeing **transitional relief,** the Court should not disregard the legislative purpose. Accordingly, the remedy adopted should be one that recognizes and gives proper effect to the population variances among the districts as well as the economic differences among them. *See* Appendix F at 54-55; *see also* 509 F. 2d at 1053. [Emphasis added.]

In accordance with the Fourth Circuit opinion, on June 21, 1974, the district court ordered interim reapportionment per a "5-3 plan" with only three at-large candidates having no residency requirements. *See* Appendix E.

After the Fourth Circuit ruling, the respondent moved the district court for an award of attorneys' fees on August 19, 1974. The district court, on January 24, 1975, awarded him $6,369.58 in attorneys' fees and expenses against the defendants (including the state officials) in their representative capacities to be paid by Union County. See Appendix D at 44. The petitioners appealed from that Order and submitted a brief and a motion for summary reversal on May 7, 1975. On May 19, 1975, the petitioners filed a supplement to motion for summary reversal pointing out to the Fourth Circuit this Court's decision in *Alyeska Pipeline Service Company v. The Wilderness Society,* 421 U. S. 240, 44 L. Ed. 2d 141 (1975). On May 28, 1975, the petitioners filed an additional supplement to motion for summary reversal pointing out to the Fourth Circuit this Court's decision in *Dallas County, Alabama v. Reese,* 421 U. S. 477, 44 L. Ed. 2d 312 (1975).[1] Four months later on September 22, 1975,[2] the motion for summary reversal was denied. On September 24, 1975, the respondent Lytle filed a supplemental memorandum in support of plaintiff's motion for attorneys' fees. This supplemental

[1] On June 5, 1975, the attorney for the respondent requested an extension of time in which to file his brief in this case, and also an extension of time in which to file a reply to appellants' motion for summary reversal. The respondent's response to the appellants' motion for summary reversal had been due on May 16, 1975, and the respondent's brief was due on June 9, 1975. Over the appellant's objection, the circuit court granted an extension of time to respond to the motion for summary reversal until June 23, 1975, and an extension of time to file his brief until July 1, 1975. The effect which the delay occasioned by the extension had is, of course, unknown. Perhaps the appellants' motion or their appeal could have been heard prior to the enactment of 42 U. S. C. 1973 *l* (e) had not the extension of time been granted the respondent, in which case this petition, as will be seen, would have been unnecessary.

[2] After the enactment of § 1973 *l* (e), which occurred on August 6, 1975.

memorandum contains the first mention of 42 U. S. C. § 1973 *1*(e), Section 14(e) of the August 6, 1975, amendment to the Voting Rights Act. On February 10, 1976, the Court of Appeals for the Fourth Circuit affirmed the district court's award of attorneys' fees to the respondent based solely upon the application of 42 U. S. C. § 1973 *1* (e). The petitioners' petition for rehearing and motion for rehearing *en banc* was denied on March 15, 1976.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it decided constitutional questions in a way in conflict with applicable decisions of this Court, and it also raises important questions of federal law that have not been settled by this Court. Moreover, the decision below conflicts with the decisions of other courts of appeals on the same matter.

I

On August 6, 1975, the Voting Rights Act of 1965 was amended by Congress. Section 402 of the 1975 amendment adds a new Section 14(e) to the Voting Rights Act, 42 U. S. C. § 1973 *1* (e), which provides as follows:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The court of appeals based its award of attorneys' fees solely upon § 1973 *1* (e). To fully understand the manifest injustice of that decision, this Court should note that the petitioners never violated anyone's constitutional rights, but, instead, have been the victims of several clearly erroneous opinions of the District Court for the District of South Carolina and the Fourth Circuit Court of Appeals.

Moreover, throughout the conduct of this litigation the petitioners have acted expeditiously and in good faith.

The district court held that the Union County apportionment scheme was unconstitutional solely because of the unequal population of the eight Union County townships. *See* Appendix G at 69; *see also* 376 F. Supp. at 311. The Fourth Circuit modified the district court's order, but also found the Union County apportionment scheme unconstitutional based solely upon the unequal population of the eight Union County townships. *See* Appendix F at 53; *see also* 509 F. 2d at 1052-53. On May 19, 1975, this Court unanimously upheld an apportionment scheme identical to Union County's in *Dallas County, Alabama v. Reese,* 421 U. S. 477, 44 L. Ed. 2d 312 (1975). Dallas County specifically invalidated the precise theory upon which the lower court and the Fourth Circuit based their opinions:

> That theoretical presumption is that elected officials will represent the district in which they reside rather than the electorate which chooses them. But that is precisely the proposition rejected in Dusch. *Id.* at 44 L. Ed. 2d 315.

The apportionment decisions of the district and circuit courts were, therefore, clearly erroneous. It is academic that after May 19, 1975, the petitioners on the record in this case would be entitled at any time to return to their prior apportionment scheme.

On January 24, 1975, the district court awarded the respondent attorneys' fees based primarily upon the private attorney general theory and alternatively upon the common benefit theory. *See* Appendix D at 37; *see also* 65 F. R. D. 699. After the petitioners had appealed, written a brief and moved for summary reversal of this ruling, this Court unequivocally invalidated the private attorney general theory as a basis for the award of attorneys' fees in *Alyeska Pipeline Service Co. v. The Wilderness Society,*

421 U. S. 240, 44 L. Ed. 2d 141 (1975). *Alyeska* also invalidated the application of the common fund theory to the facts of this case. *Id.* at 264 n. 39, 44 L. Ed. 2d at 157-58. The court of appeals recognized that the district court's order was totally invalidated by *Alyeska.*

> On May 12, 1975, the Supreme Court handed down its opinion in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U. S. 240 (1975). That case specifically destroyed the power of a district court to award attorney's fees under the private attorney general theory. Furthermore, the Court's discussion of the proper application of the common benefit theory clearly indicated that it is inappropriate for the case at hand. *Id.* at 264 n. 39. *See* Appendix B at 26.[3]

From the foregoing the following undisputed facts emerge:

1. *Dallas County* makes it clear that the district court erred in granting respondent Lytle's motion for summary judgment.

2. *Dallas County* makes it clear that the Fourth Circuit erred in its modification of the district court's opinion.

3. *Alyeska* makes it clear that the district court erred in its award of attorneys' fees to respondent Lytle.

4. The petitioners never violated anyone's constitutional rights and never diluted the voting power of respondent Lytle.

5. All opinions by the lower courts state that the petitioners litigated this action expeditiously and in good faith to achieve a just resolution.

The basic issue before this Court is whether *Bradley v. Richmond School Board,* 416 U. S. 696, 40 L. Ed. 2d 476 (1974), mandates the application of 42 U. S. C. § 1973

[3] This ruling expressly contradicts the prior denial of petitioners' motion for summary reversal wherein the circuit court found "substantial questions of law" raised by the private attorney general and common benefit theories. *See* Appendix C.

1 (e) to authorize an award of attorneys' fees to respondent Lytle who has been the recipient of three clearly erroneous decisions of the lower courts, especially when a motion for summary reversal was expeditiously made three months prior to the enactment of § 1973 *1* (e).[4]

A. The respondent Lytle does not meet the requirements of § 1973 1 (e).

The issue of the application of an Act of Congress enacted after the initial submission of a case to a court of appeals but prior to its decision was discussed at length by this Court in *Bradley, supra:*

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley, supra* at 711, 40 L. Ed. 2d at 488.

This Court expressly held that "the law in effect at the time it renders its decision" includes opinions of this Court as well as statutes. *Bradley, supra* at 715, 40 L. Ed. 2d at 490. Therefore, this Court, should it decide to apply the new statute, must apply the law as stated in the *Dallas County* and *Alyeska* decisions as well.

It is apparent that respondent Lytle attempted to bring "an action to enforce . . . voting guarantees of the fourteenth amendment" as required by Section 1973 *1* (e). Both the district court and, originally, the circuit court had found a dilution of Lytle's voting power based solely on the "substantial inequality in population of these [Union County] townships." *See,* Appendices F and G at

[4] The circuit court's prediliction to award the respondent attorneys' fees regardless of the applicable facts and law is demonstrated by that court's refusal to summarily reverse the district court's award after the *Alyeska* decision and before the enactment of § 1973 *1* (e) as well as before the respondent claimed that § 1973 *1* (e) applied.

53 and 69, respectively. But the court of appeals, in affirming the award of attorney's fees, for the first time determined from Lytle's affidavit, submitted by him in support of his motion for summary judgment,[5] that the township commissioners represented only the interest of their respective townships. *See* Appendix B at 29. Interestingly, the circuit court made no reference to the complaint which contains no such allegation and it completely ignored the affidavit of each township commissioner which stated that he:

> represents not only the township in which he resides but also the entire electorate of Union County and is responsive to the needs of the entire county.

The fourteenth amendment, however, as *Dallas County* shows, does not "guarantee" a voter that residency districts shall be substantially equal in population when a county employs an at-large voting requirement which is coupled with a requirement that candidates be elected from residency districts, and when the interest of the entire electorate of the county, and not just that of the district, is represented by those elected.

At any rate, the circuit court justified its award of attorneys' fees based on a showing which Lytle "might have . . . made had his motion for summary judgment been denied." *See* Appendix B at 29. Section 1973 *1* (e), however, does not apply to actions that might enforce fourteenth amendment voting guarantees. *Dallas County* clearly demonstrates that this case, as revealed by its record, was not such an action. If *Bradley* mandates that the circuit court, in determining whether or not to award attorneys' fees, apply the law in effect on the date of its

[5] Quite properly, the district court had not granted the respondent summary judgment based on the ground that the commissioners represented the interests of their respective residency districts and not the county at large since the opposing affidavits had clearly raised an issue as to that fact.

decision, then it must apply *Dallas County;* therefore, it is apparent that respondent Lytle did not bring a suit to which § 1973 *1* (e) applies because this suit does not, as we have said, enforce a right which the fourteenth amendment guarantees.

Moreover, respondent Lytle is not the "prevailing party" under § 1973 *1* (e). Lytle was not the prevailing party either on August 6, 1975, the date of enactment of § 1973 *1* (e), or on February 10, 1976, the date of decision by the circuit court. After May 19, 1975, the date of the *Dallas County* decision, the petitioners would be entitled to return to their prior apportionment plan at any time and, therefore, under *Dallas County* the petitioners are the prevailing parties within the ambit of § 1973 *1* (e).

Furthermore, in view of the fact that only transitional relief was ordered and, as we have said, because of this Court's holding in *Dallas County,* the petitioners are entitled to return to the original election scheme. It shall be recalled that the "5-3" plan currently in effect in Union County is merely an interim plan. Thus, there is no "prevailing party" at this juncture and the award of attorneys' fees, therefore, was premature. *See,* Appendix F at 55; *see also,* 509 F. 2d at 1053.

B. An award of attorneys' fees to respondent Lytle would result in "manifest injustice" under Bradley.

As demonstrated above the petitioners have never been in violation of any law, have never violated anyone's constitutional rights and are, in fact, the victims of three erroneous judicial opinions. The ends of justice simply cannot be served by requiring them to pay the plaintiff's attorneys' fees.

The circuit court rejected the petitioners' "manifest injustice" argument as being wholly without merit because "all of the reasons advanced by Mr. Justice Blackmun in

Bradley for refusing the benefit of the exception to the school board apply equally here." *See* Appendix B at 29. It is respectfully submitted that this interpretation of *Bradley* by the circuit court creates a dangerous precedent which would completely swallow the "manifest injustice" exception to this Court's rule concerning the application of the law in existence upon the date of an appellate court's decision. If the petitioners do not meet the "manifest injustice" exception in *Bradley,* no party can come within the terms of that exception, and the exception should be laid to rest by this Court.

Initially, it is important to note that the petitioners are not even remotely analogous to the school board in *Bradley.* The district court in *Lytle* specifically found that:

> There is absolutely no evidence here to support a finding by this court that the defendants litigated in bad faith, or that the defense was offered without any possible basis in law or fact. Indeed, under a prior ruling of the Supreme Court of South Carolina in *Knight v. Salisbury,* S. C., 206 S. E. 2d 875 (1974), no body politic of which any of the defendants were members had legal authority to reapportion the Union County Board of Commissioners. Because of this unique circumstance, an award of attorney's fees based upon obstinacy, or bad faith, is manifestly not warranted. Appendix D at 35, 65 F. R. D. at 701-02.

The school board in *Bradley,* however, indulged in racial discrimination, obdurate obstinacy and bad faith in its defense of school desegregation litigation. *Bradley, supra* at 705-07, 40 L. Ed. 2d at 485-86. Moreover, this Court recognized the fact that the school board in *Bradley* was directly responsible for the existing discriminatory educational policies [*Bradley, supra* at 718, 40 L. Ed. 2d at 492], but the defendants in *Lytle* had no control over their apportionment scheme.

This Court in *Bradley,* before discussing the "manifest injustice" exception, stated that:

> [T]he precise category of cases to which this exception applies has not been clearly delineated. . . . *Id.* at 717, 40 L. Ed. 2d at 491.

It is respectfully submitted that this Court refused to definitively categorize all instances of "manifest injustice" so that a court might exercise its discretion in equity to reach a just result. Here, it would be unjust to require the petitioners to pay the respondent's attorneys' fees because they have at all times litigated the action expeditiously and in good faith and have been victimized by three clearly erroneous lower court decisions. The injustice of this situation as evidenced by the fact that attorneys' fees have never before been awarded under like circumstances is so manifest, that it did not require an express delineation from this Court until now.

C. Petitioners were entitled to a summary reversal of the district court's order on May 16, 1975.

The circuit court delayed ruling on the motion for summary reversal until September 22, 1975. Respondent Lytle's response to that motion was due on May 16, 1975.[6] Petitioners respectfully submit that they were entitled to a decision in this matter long before § 1973 *1* (e) was passed on August 6, 1975. Petitioners' right to a decision vested before § 1973 *1* (e) was enacted, and, therefore, under *Bradley* the date of decision of the circuit court should be deemed to be the original date that the respondent should have filed his brief and response to the motion for summary reversal. To hold otherwise would allow a party to benefit from a delay in the circuit court, which, as in this case, could substantially alter the legal rights

[6] *See* note 3, *supra.*

of the parties, thereby resulting in "manifest injustice" under *Bradley*.

II

42 U. S. C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Court's interpretation of § 1983 is clear; local governments are not "persons" within the meaning of § 1983 and not subject to suits either at law or in equity. In *Monroe v. Pape*, 365 U. S. 167, 5 L. Ed. 2d 492 (1961), the Supreme Court expressly held that municipal corporations were not persons within the ambit of § 1983 for the imposition of civil liability.

> The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them. *Id.* at 191, 5 L. Ed. 2d at 507.

Monroe was followed by *Moor v. County of Alameda*, 411 U. S. 693, 36 L. Ed. 2d 596 (1973), in which the Supreme Court held that a county was not a "person" within the ambit of §§ 1983 and 1988. Significantly, jurisdiction in the instant suit is based on the same statutes. Shortly after *Moor* the Supreme Court in *City of Kenosha v. Bruno*, 412 U. S. 507, 37 L. Ed. 2d 109 (1973), held that municipalities were not "persons" under § 1983 even when equitable relief was sought rather than damages.

> We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. [T]hey are outside of its ambit for purposes of equitable relief as well as damages. *Id.* at 513, 37 L. Ed. 2d at 116.

In the face of the clearest possible precedents from this Court, the district court ignored the § 1983 "person" issue and the Fourth Circuit curtly dismissed it by relying upon two of their previous opinions—*Burt v. Board of Trustees*, 521 F. 2d 1201 (4th Cir. 1975), and *Thomas v. Ward*, 529 F. 2d 916 (4th Cir. 1975). *See* Appendix B at 30. The circuit court's decision is erroneous for two reasons: (1) no county officials were sued in their representative capacities, and (2) the reasoning in both *Burt* and *Thomas* directly contravenes the opinions of this Court, other circuit courts and other federal district courts.

It is apparent that the circuit court did not fully understand the nature of the parties in this action, and therefore it is important to realize that no county official was sued in his representative capacity.[7] Respondent Lytle sued the Commissioners of Election of Union County as a group and individually. The election commissioners of Union County are state officeholders appointed by the Governor to ensure the efficient operation of federal, state and local elections in accordance with the South Carolina Code of Laws. *See* S. C. Code Ann. §§ 23-391 and 23-400 (Cum. Supp. 1975). Respondent Lytle also sued the Union County Delegation as a body politic and its members, two State Senators and one State Representative. It cannot seriously be argued that State Senators and Representatives are not state officials rather than county officials. The only other

[7] *See* section III, *infra*, for a discussion of the eleventh amendment immunity of all state officials.

party sued by respondent Lytle is the "Union County Commissioners"; the individual county commissioners have not been sued. While there is no doubt that the individual county commissioners are county officials, they are not parties, and therefore the following quote from the district court's opinion simply does not make any sense.

> The award here, as aforementioned, will not be paid from state coffers, but is directed against the treasury of Union County, since the defendants are county officials who have been sued only in their representative capacity, and, thus, it will be county funds and not state funds which are expended. *See* Appendix C at 44, 65 F. R. D. at 707 (citation and footnote omitted).

To further complicate this issue the circuit court stated:

> As the district court found, this suit is against county and not state officials [10] and any award will be satisfied from Union County's treasury.

[10] The Commissioners admit, as they must, that they are not state officials. Brief for Appellants at 26.

The petitioners admitted in their brief that each Union County Commissioner was a county official, but asserted that the individual county commissioners were not parties to this suit. The petitioners have never contended, as they could not under existing laws, that either the individual Commissioners of Election [8] or the members of the Union County Delegation are county officials.

With no individual county officials in this suit, the respondent Lytle is left with the body politic of the "Union County Commissioners". A suit against the "Union County Commissioners" as a body is indistinguishable from a suit against Union County, and therefore clearly governed by

[8] *See, e.g.*, No. 237, Part I, § 12 [1975] S. C. Acts and Jt. Res. 364-65, which appropriated *State* funds for the salaries of the members of county election commissions.

Monroe, Moor and *Bruno, supra. See also Commissioners v. Bank of Commerce,* 97 U. S. 374, 24 L. Ed. 1060 (1878). In fact, other courts have faced this same issue and properly interpreted *Monroe, Moor* and *Bruno:*

> On the face of it, the Board of Supervisors is a group of individuals, not a "person". Moreover, it is clear from plaintiff's complaint that he is suing the Board as an institution, since the individual members of the Board are not named individually or in any way identified. As an institution the Board is simply a unit of the Monroe County government. Any judgment against the Board would be collected from the County Treasury. In effect, then, the action against the Board is an action against the County of Monroe, a result forbidden by *Monroe, supra.* [T]he rationale of *Monroe, supra,* and the weight of authority compel the conclusion that the Monroe County Board of Supervisors is not a "person" within the meaning of § 1983. *Veres v. County of Monroe,* 264 F. Supp. 1327, 1330-31 (E. D. Mich. 1973).

See also Diamond v. Coleman, 395 F. Supp. 429, 430-31 (S. D. Ga. 1975).

Even if a county official had been sued in his representative capacity, the circuit court erred in circumventing this Court's mandate in *Monroe, Moor,* and *Bruno.* In *Burt v. Board of Trustees,* 521 F. 2d 1201 (4th Cir. 1975), the Fourth Circuit held that:

> To the extent the complaint seeks equitable relief under § 1983 against the members of the Board in their official capacities it may be prosecuted, for such municipal officers are "persons" within the meaning of § 1983. *Id.* at 1205.[9]

This reasoning directly contravenes this Court's statement in *Bruno* that the "person" requirement of § 1983 cannot

[9] This reasoning was recently approved by other members of the Fourth Circuit in *Thomas v. Ward,* 529 F. 2d 916 (4th Cir. 1975).

be bifurcated depending upon the relief sought. *See* p. 15, *supra. See also Adkins v. Duval County School Board,* 511 F. 2d 690, 692 (5th Cir. 1975).

There appears to be a disagreement among the circuit courts concerning the circumvention of the § 1983 "person" requirement by suing local officials in their representative capacities, although no court has gone as far as the Fourth Circuit in *Burt* and *Thomas. Compare Incarcerated Men of Allen County Jail v. Fair,* 507 F. 2d 281 (6th Cir. 1974) and *Ybarra v. City of Town of Los Altos Hills,* 503 F. 2d 250 (9th Cir. 1974), *with Muzquiz v. City of San Antonio,* 520 F. 2d 993 (5th Cir. 1975); *Adkins v. Duval County School Board,* 511 F. 2d 690 (5th Cir. 1975); *Garrett v. City of Hamtramck,* 503 F. 2d 1236 (6th Cir. 1974); *and Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500 F. 2d 1087 (6th Cir. 1974), *cert. den.* 419 U. S. 1108, 42 L. Ed. 2d 805 (1975). *See also Hamilton v. Chaffin,* 506 F. 2d 904 (5th Cir. 1975); *Needleman v. Bohlen,* 386 F. Supp. 741 (D. Mass. 1974); *Klein v. New Castle County,* 370 F. Supp. 85 (D. Del. 1974); *Downs v. Department of Public Welfare,* 386 F. Supp. 454 (E. D. Pa. 1973); *Hayes v. Cape Henlopen School District,* 341 F. Supp. 823 (D. Del. 1972).

It is inconceivable that this Court intended its decisions in *Monroe, Moor* and *Bruno* to be circumvented simply by suing local officials in their representative capacities. Certainly the lack of jurisdiction over municipalities under § 1983 amounts to more than artful pleading; in fact, this Court found in *Monroe* that Congress specifically rejected municipal liability in its enactment of § 1983. *Monroe, supra passim.* It is respectfully submitted that the potential § 1983 liability of municipal governments by suits against municipal officials in their representative capacities is an issue of utmost importance to all communities in the

United States, has been a source of disagreement by the lower courts and should be finally resolved by this Court.

III

Should this Court grant this petition and rule against the petitioners on Question I, and rule for the petitioners on Question II, the possible liability of the state officials acting in their representative capacities will become important. This issue is significant because the Fourth Circuit has intimated that § 1973 *1* (e) might supersede the eleventh amendment immunity of the states. *See* Appendix B at 30, n. 11. For the purposes of this petition, the petitioners would merely point out the following:

1. The circuit courts have conflicted in their interpretation of *Edelman v. Jordan,* 415 U. S. 651, 39 L. Ed. 2d 662 (1974), as it applies to an eleventh amendment bar to an award of attorneys' fees against state officials acting in their representative capacities. *Compare Incarcerated Men of Allen County Jail v. Fair, supra; Taylor v. Perini,* 503 F. 2d 899 (6th Cir. 1974), *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F. 2d 31 (3rd Cir. 1974); *and Jordan v. Gilligan,* 500 F. 2d 701 (6th Cir. 1974), *with Souza v. Travisono,* 512 F. 2d 1137 (1st Cir. 1975); *Class v. Norton,* 505 F. 2d 123 (2d Cir. 1974) *and Jordon v. Fusari,* 496 F. 2d 646 (2d Cir. 1974).

2. The effect on a state's treasury of an award of attorneys' fees and an award of retroactive welfare payments (*Edelman*) is identical.

3. The resolution of the conflict between Congressional enactments authorizing attorneys' fees and the eleventh amendment is the subject of an extensive law review article. *See* Note, *Attorneys' Fees and the Eleventh Amendment,* 88 Harv. L. Rev. 1875 (1975).

4. The petitioners are prepared to fully brief this issue and demonstrate that the eleventh amendment bars an

award of attorneys' fees against state officials acting in their representative capacities should this petition be granted.

CONCLUSION

For the reasons stated above, this petition for *certiorari* should be granted.

DANIEL R. McLEOD,
Attorney General,

C. TOLBERT GOOLSBY, JR.,
Deputy Attorney General,

KAREN LeCRAFT HENDERSON,
Assistant Attorney General,

JOHN L. CHOATE,
Assistant Attorney General,
Attorneys for Appellants.

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1327

ROBERT LYTLE, APPELLEE,

versus

COMMISSIONERS OF ELECTION OF UNION COUNTY, NAMELY; COMMISSIONER JOE WIX, COMMISSIONER WALTER VANDERFORD, COMMISSIONER HOWARD NELSON, COMMISSIONER WILBUR HODGE, COMMISSIONER BOBBY MANGUM AND THE UNION COUNTY DELEGATION, REPRESENTATIVE JAMES ARTHUR, SENATOR JOHN D. LONG AND SENATOR ROBERT BLAKE, AND THE UNION COUNTY COMMISSIONERS, APPELLANTS.

ORDER

Upon consideration of appellants' petition for rehearing and suggestion for rehearing *en banc,* and no judge having requested a poll on the suggestion for rehearing *en banc,*

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

For the Court—By Direction.

/s/ WILLIAM K. SLATE, II,
Clerk.

A True Copy, Test:
WILLIAM K. SLATE, II, Clerk.
By /s/ E. BELTON,
Deputy Clerk.

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1327

ROBERT LYTLE, APPELLEE,

versus

COMMISSIONERS OF ELECTION OF UNION COUNTY, NAMELY; COMMISSIONER JOE WIX, COMMISSIONER WALTER VANDERFORD, COMMISSIONER HOWARD NELSON, COMMISSIONER WILBUR HODGE, COMMISSIONER BOBBY MANGUM AND THE UNION COUNTY DELEGATION, REPRESENTATIVE JAMES ARTHUR, SENATOR JOHN D. LONG AND SENATOR ROBERT BLAKE, AND THE UNION COUNTY COMMISSIONERS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG
SOL BLATT, JR., DISTRICT JUDGE

Argued November 12, 1975 Decided Feb. 10, 1976

Before WINTER, CRAVEN, AND WIDENER, CIRCUIT JUDGES

John L. Choate, Assistant Attorney General of South Carolina (Daniel R. McLeod, Attorney General of South Carolina, C. Tolbert Goolsby, Jr., Deputy Attorney General, Karen LeCraft Henderson, Assistant Attorney General of South Carolina, Bruce W. White, Union County Attorney, on brief), for Appellants; Amand Derfner and David Ross Clarke, for Appellee.

CRAVEN, Circuit Judge:

This is an appeal by the Commissioners of Election of Union County from an award of attorney's fees to counsel for Lytle. We affirm.

I

In March 1974 Appellee Robert Lytle brought suit under 42 U. S. C. § 1983 against the Commissioners of Election of Union County, South Carolina, in their official capacities alleging generally that residency requirements for election to the Township Commission[1] violated the fourteenth amendment by diluting the power of his vote. He sought declaratory and injunctive relief against the future operation of that system of representation.

In May 1974 the district court entered summary judgment for Lytle, finding that while elections were at large for the entire eight-member Commission, the requirement that each commissioner reside in a separate township violated the fourteenth amendment because of the substantial inequality in population of these townships. Judge Blatt enjoined the Election Commissioners from holding any further elections for the Commission under these residency requirements and ordered that the primary and general elections in 1974 be conducted with all candidates running at-large on a countywide basis.

Hearing the case on expedited appeal, we affirmed the holding of the district court that the residency requirements of the election plan in Union County were unconstitutional.[2] We read *Dusch v. Davis*, 387 U. S. 112 (1967), as meaning that while residency requirements may be constitutionally permissible as part of a rational system of local government, the system was constitutionally deficient where the plan would allow a "minority in numbers . . . to control the governing board. . . ." [3] 509 F. 2d at 1052. However, finding that the interim relief ordered by the district court was unnecessarily extensive, we reversed on that issue and remanded with the direction that a plan be developed which incorporated the election of some members from specific geographical areas and others as "floaters"

[1] The Board of Township Commissioners and the County Supervisor constitute the governing body of Union County.

[2] *Lytle v. Commissioners of Election*, 509 F. 2d 1049 (4th Cir. 1974).

[3] One of the county's eight districts contained 58 percent of its total population. 509 F. 2d at 1052.

without any residency requirements.[4] On remand the district court ordered implementation of a plan with five members of the Commission elected with residency requirements and three without any such requirements.

In August 1974 Lytle filed a motion for attorney's fees. A hearing was held on the motion in September, and in January 1975 Judge Blatt entered an order awarding attorney's fees in the amount of $5,000.00. It is from this award that the instant appeal is taken.

II

The district court granted attorney's fees on alternative grounds: the private attorney general and the common benefit theories, although he specifically stated in his order that he felt the former theory was "more applicable" to the facts of this case. What was a relatively simple question at the time is now complex because the law has changed.

On May 12, 1975, the Supreme Court handed down its opinion in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U. S. 240 (1975). That case specifically destroyed the power of a district court to award attorney's fees under the private attorney general theory. Furthermore, the Court's discussion of the proper application of the common benefit theory clearly indicated that it is inappropriate for the case at hand. *Id.* at 264 n. 39. The Court specifically recognized that it was for the Congress to select, by statutory authorization, those types of actions in which attorney's fees should be awarded.

And Congress acted on August 6, 1975, adding § 14(e) as an amendment to the Voting Rights Act. That section[5] provides as follows:

> (e) In any action or proceeding to enforce the voting guarantees of the fourteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[4] Of critical importance to this case, no petition for *certiorari* was filed in the *Lytle* case. A petition for *certiorari* was filed in *McCain v. Lyland,* Lytle's companion case, and was denied. 419 U. S. 1032 (1974).

[5] 42 U. S. C. § 1973 l (e).

Then came *Dallas County v. Reese,* 421 U. S. 477 (1975), decided on May 19, 1975. *Dallas County* held that the fact a majority of a governing board may be elected from residential districts comprising a minority of the entire unit's population, **without more,** does not establish a constitutional violation. The Court nevertheless recognized that such claims may establish a constitutional violation, but in order to do so, they "must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." *Id.* at 480. *See also, Vollin v. Kimbel,* 519 F. 2d 790 (4th Cir. 1975).

III

In *Bradley v. Richmond School Board,* 416 U. S. 696 (1974), the Supreme Court held that on direct appeal "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. We readily agree with the Commissioners' argument that judicial opinions as well as statutory developments are included within the "law in effect" concept. *See id.* at 715.

The Commissioners concede that in a proper case the district courts are authorized by § 14(e) of the 1975 Voting Rights Act amendments to award counsel fees. But they urge this is not such a case and that on its peculiar facts and because of *Dallas County, supra,* Lytle is not entitled to receive the benefit of the statute. We disagree.

The Commissioners argue first that Lytle is not the prevailing party even before *Dallas County.* They contend that, since all residency requirements were not abolished and since modifications of the plan could be made either by the legislature or the district court, Lytle did not prevail below. The district court, in considering the issue of attorney's fees, concluded that Lytle had prevailed. We find that while all residency requirements were not abolished under the terms of the circuit court's opinion, Lytle did establish in that suit that the system in operation violated the Constitution and won relief appropriate, in

the opinion of this court, to remedy that constitutional infirmity.[6]

Even after *Dallas County*,[7] Lytle remains the prevailing party. Since the Commissioners did not seek review in the Supreme Court, our decision became the law of the case.[8]

We reject the Commissioners' contention that, under *Dallas County's* explication of the meaning of the Constitution, Lytle's suit is not "an action to enforce any voting guarantees of the fourteenth amendment" and, therefore, does not come within the terms of the 1975 legislation.[9]

Dallas County held that, without more, residency requirements of the type in effect in Union County did not violate the fourteenth amendment. That case, as noted above, recognized that a constitutional violation is established where it is shown that the "plan operates to imper-

[6] Commissioners' contention that to be the "prevailing party" Lytle must win on all issues is clearly without merit. "Although a plaintiff may not sustain his entire claim, if judgment is rendered for him he is the prevailing party." 6 J. Moore, Federal Practice ¶ 54.70[4], at 1306-07 & n. 3 (2d ed. 1975). *Accord*, 10 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2667, at 129 & n. 8 (1971). *See, e.g., K-2 Ski Co. v. Head Ski Co.*, 506 F. 2d 471, 477 (9th Cir. 1974); *Lewis v. Pennington*, 400 F. 2d 806, 820 (6th Cir.), *cert. denied*, 393 U. S. 893 (1968); *Sperry Rand Corp. v. A-T-O, Inc.*, 58 F. R. D. 132, 135 (E. D. Va. 1973). (All the authorities cited above discuss the "prevailing party" concept in the context of Fed. R. Civ. P. 54. We believe that same analysis is applicable to the term as used in the statute.)

[7] In construing the term "prevailing party," the Commissioners would have us presume that when Congress enacts legislation it is aware of all existing law and on that basis would have us hold that under *Dallas County* Lytle could not come within the intended meaning of that term. If we are to assume so much, we might with equal validity presume that Congress was also aware of the Commissioners' failure to petition for *certiorari* and recognized that under the law of the case concept Lytle was the prevailing party.

[8] *See, e.g., D. C. Federation of Civic Assns. v. Volpe*, 459 F. 2d 1231, 1267-68 (D. C. Cir. 1971), *cert. denied*, 405 U. S. 1030 (1972). *Cf. Stonega Coke & Coal Co. v. Price*, 116 F. 2d 618, 621 (4th Cir. 1940).

We also note that *Bradley, supra*, recognized specifically a distinction between application of subsequent legal developments to a case on direct appeal, concluding the new developments were clearly applicable, from consideration on collateral attack, as here, where the Court suggested there was no absolute rule of application. 416 U. S. at 710-11. Since we conclude, *infra*, that even if *Dallas County* is applied the Commissioners do not prevail, we need not decide the issue left open by the Supreme Court in *Bradley*.

[9] While we conclude on independent grounds that the Commissioners' argument here is without merit, we believe the law of the case rationale, set out in the text, *supra*, is a sufficient basis for decision.

missibly dilute the voting strength of an identifiable element of the voting population." 421 U. S. at 480.

This case was decided in favor of Lytle on motion for summary judgment. The court made no finding as to the invidious effect of the plan's operation in Union County because prior to *Dallas County* such a finding would have been superfluous. For reasons already expressed, we need not go back and retry the case. For Lytle to prevail, all we need determine is whether this was an action to enforce the voting guarantees of the fourteenth amendment. It is enough that under the theory of Lytle's complaint such a showing might have been made had his motion for summary judgment been denied.

Lytle specifically alleged that the system operated to dilute his voting strength in violation of the fourteenth amendment. Furthermore, Lytle's affidavit, which was before the court when it considered the motion for summary judgment, specifically contends "that other Commissioners [outside Union Township, which contains over 50 percent of the county's population] have primarily represented the interests of their respective townships. . . ." This is precisely the type of allegation which *Dallas County* recognized would establish a constitutional violation if accepted as true "'If a borough's resident on the council represented in fact only the borough, . . . different conclusions might follow.'" 421 U. S. at 480 (quoting from *Dusch v. Davis, supra*). We, therefore, conclude that Lytle's action does in fact come within the terms of § 14(e) of the 1975 amendments to the Voting Rights Act.

The Commissioners further urge that in any case attorney's fees should not be awarded since they come within the exception mentioned in *Bradley, supra*, that legal developments during appeal should not be applied where they would cause "manifest injustice." 416 U. S. at 711. We view this argument as wholly without merit. All of the reasons advanced by Mr. Justice Blackmun in *Bradley* for refusing the benefit of the exception to the school board apply equally here.

Finally, the Commissioners argue that they are immune from suit under the eleventh amendment and that

they may not be sued under 42 U. S. C. § 1983 since in their official capacities they are not persons within the meaning of that statute.

As the district court found, this suit is against county and not state officials[10] and any award will be satisfied from Union County's treasury. App. 56. It has been established for almost a century that under these circumstances counties and *a fortiori* county officials are not protected from suit by the eleventh amendment.[11] *Lincoln County v. Luning,* 133 U. S. 529 (1890). *See Melman v. Jordan,* 415 U. S. 651, 667 n. 12 (1974); *Burt v. Board of Trustees,* 521 F. 2d 1201, 1205 & n. 5 (4th Cir. 1975).

The Commissioners' argument that in their official capacities they are not "persons" within the meaning of 42 U. S. C. § 1983 is similarly without merit. We have held otherwise. *Burt, supra* at 1205; *Thomas v. Ward,* No. 74-1541 (4th Cir. Nov. 24, 1975) (citing *Burt*).

IV

Section 14(e) of the 1975 amendments to the Voting Rights Act provides that the award of attorney's fees under this statute is to be made in the "discretion" of the district court. The Commissioners would have us remand for exercise of that discretion.

We have carefully examined the decision of the district judge awarding attorney's fees and the transcript of the hearing when the matter was under consideration. It is clear that the district court unequivocally exercised its discretion in favor of an award of attorney's fees. Judge Blatt expressed his high regard for the legal work done

[10] The Commissioners admit, as they must, that they are not state officials. Brief for Appellants at 26.

[11] The legislative history of the 1975 amendments may be read to intend a limitation of the eleventh amendment's application in this area, rendering the amendment's protections unavailable even to states. *See* 1975 U. S. Code Cong. & Ad. News 1492. If such a result were intended, and we have no occasion to reach that issue in this case, the efficacy of congressional action would appear to depend on its authority under the fourteenth amendment and specifically Congress' power under the fifth section of that amendment to enforce its guarantees against the states. *See* Note, *Attorneys' Fees and the Eleventh Amendment,* 88 Harv. L. Rev. 1875, 1897-1902 (1975); Comment, *Federal Powers and the Eleventh Amendment: Attorneys' Fees in Private Suits Against the State,* 63 Calif. L. Rev. 1167, 1206 n. 189 (1975).

by Lytle's counsel in this case and stated: "If I can find legal authority to award attorney's fees, I want to do that." App. 35. We hold that legal authority does exist. That it derives from an act of Congress rather than judge-made law would seem to make no difference in the exercise of discretion, and we decline to require a further hearing.[12]

AFFIRMED.

WIDENER, Circuit Judge, concurring:

I concur in the result reached in the majority opinion for the reasons set forth just below.

In the instant case, the merits of the dispute were not appealed and, as such, that judgment is final. This being so, I am of opinion the Supreme Court's decision in *Bradley v. Richmond School Board,* 416 U. S. 696 (1974), is controlling. There, the Court had before it the question of the propriety of an award of attorneys' fees under a statute authorizing such an award adopted during the pendency of an action seeking to recover such fees. As stated by the Court:

> "The question, properly viewed then, is not simply one relating to the propriety of retroactive application of [the statute allowing attorneys' fees] to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law." 416 U. S. at 710.

Barring any manifest injustice or statutory directive to the contrary, the Court concluded that "a court is to apply the law in effect at the time it renders its decision." 416 U. S. at 711. Thus, although the district court's ruling on the merits of the matter now before us may have been erroneous at the time it was rendered, its reconsideration is closed to us, and I am of opinion we are bound by *Brad-*

[12] Judge Blatt also carefully exercised his discretion with respect to amount, arriving at the $5,000.00 award. He reduced the figure submitted by Lytle's attorneys by more than 60 percent because he believed it proper to act conservatively when dealing with the disbursement of public funds.

ley to apply § 14(e), 42 U. S. C. § 1973l (e), of the 1975 Voting Rights Act amendments so as to sustain the award of attorneys' fees.

Since *Ex parte Young,* 209 U. S. 123 (1907), affirmative relief has been available to require public officials to perform their duties in a constitutional manner. That being true, and since it has previously been decided in *Lincoln County* that counties are not immune from suit under the Eleventh Amendment, the only other reasoning (than *Bradley*) necessary to support the decision reached here is § 14(e), 42 U. S. C. § 1973l (e), of the Voting Rights Act, which specifically allows attorneys' fees to the prevailing party in "any action" to enforce the voting guarantees involved here.

With this in mind, although I am not in accord with many or all of the statements made in the majority opinion, I do not think a dissent would add anything to the case, especially because they are *dicta.* But I should not leave the subject without noting my particular * * *

APPENDIX C

No. 75-1327

ORDER

Appellant's motion for summary reversal, appellee's response to that motion, and briefs of both parties have been read and considered. Whereas substantial questions of law are raised therein, upon which oral argument should be required, it is hereby ORDERED, with the concurrence of Judge Butzner and Judge Russell, that such motion be, and it is hereby DENIED.

/s/ J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.

A True Copy, Test:
WILLIAM K. SLATE, II,
Clerk.
By: /s/ F. O. CALORIE,
Deputy Clerk.

APPENDIX D

Civil Action No. 74-237

ORDER

On March 4, 1974, the plaintiff filed an action in this court against the named defendants in their representative capacity only, alleging that the Board of Commissioners of Union County, the governing body of that county, was malapportioned in violation of the Fourteenth Amendment to the United States Constitution and the "one man-one vote" principle established by the Supreme Court of the United States in *Baker v. Carr,* 369 U. S. 186 (1962), and its progeny. The complaint attacked the use of "at-large" elections with a residency requirement that each candidate offering for one of eight seats on the Union County Board of Commissioners reside in a particular township which such candidate sought to represent. The plaintiff alleged that the plan as then structured denied equal protection to the more populous urban townships of Union County due to the population disparity between those townships and certain sparsely populated rural townships.

On April 8, 1974, the plaintiff and defendants filed appropriate motions for summary judgment with accompanying briefs in support of these motions. This court consolidated the instant action with *McLain v. Lybrand, et al.,* C/A 74-281, a suit attacking the apportionment of the Edgefield County Council. The consolidation of the two actions followed a determination by this court that the first cause of action in *McCain* raised essentially the same issue as did the action *sub judice.*

By Order dated May 16, 1974, this court granted plaintiffs' motions for summary judgment in both cases and directed that the Union County Board of Commissioners be elected "at-large" without the imposition of a residency requirement. In that Order, this court retained jurisdiction of the action for the purpose of awarding attorney's fees if it subsequently determined that such an award was appropriate.

On May 17, 1974, the defendants in each case filed a motion to stay this court's directions as to methods by

which the forthcoming elections in Union and Edgefield Counties should be held pending the outcome of an appeal by the defendants to the Fourth Circuit Court of Appeals. This court denied such motion by Order dated May 22, 1974. Thereafter, the Honorable Donald Russell, United States Circuit Judge for this Circuit, heard an appeal from such refusal, and, on May 30, 1974, Judge Russell directed that this court's Order of May 16, 1974, be stayed pending a hearing before a panel of the Fourth Circuit Court of Appeals to be held during the week of June 3, 1974.

In an opinion filed June 17, 1974, the Fourth Circuit Court of Appeals reversed this court's judgment in *McLain,* but affirmed the judgment in *Lytle,* with the "suggestion" that the complete abolition of the residency requirement ordered by this court might be inappropriate, and this court was directed to consider the employment of "floating" representatives to solve the numerical population disparity between the representative townships of the Union County Board of Commissioners.

Following the aforesaid opinion by the Fourth Circuit Court of Appeals, this court, on June 19, 1974, ordered that a redistricting plan for Union County, which employed "floater" or "at-large" members, be instituted for the election of members to the Board of Commissioners, and no appeal was taken from this last Order. Thereafter, on August 19, 1974, the plaintiff moved for an award of attorney's fees in view of the fact that he was the prevailing party in the litigation. This court, after conducting a hearing on the aforesaid motion, ordered both parties to submit briefs directed to the propriety of an award of attorney's fees in a reapportionment case brought pursuant to 42 U. S. C. § 1983. Both parties have now submitted briefs and plaintiff's motion for attorney's fees is ripe for disposition.

The instant action was brought under 42 U. S. C. § 1983, which statute is devoid of any express authorization for an award of attorney's fees to a prevailing party. This court recognizes that the early American rule generally did not allow an award of attorney's fees in the absence of express statutory authorization. *See, e.g., Simmons v. Friday,* 190 F. (2) 849, 851 (8 Cir. 1951). However, equally apparent is the fact that this restrictive rule has been, in recent years, substantially eroded. Even prior to the recent judicial trend to award attorney's fees under certain circumstances without statutory authorization, it was well settled that federal courts, even in the absence of express statutory authorization, had equitable powers in certain instances to make such awards. *Sprague v. Ticonic National Bank,* 307 U. S. 161 (1939). Historically, this power was exercised solely to punish parties who litigated in bad faith by employing dilatory tactics and obstinate defenses. *Vaughn v. Atkinson,* 369 U. S. 527 (1962); *Bell v. School Board of Powhattan County,* 321 F. (2) 494 (4 Cir. 1963); *Rolax v. Atlantic Coastline Railroad Co.,* 186 F. (2) 473 (4 Cir. 1951). In the instant action, the record before the court makes clear that an award of attorney's fees based upon this "obstinate obdurancy" theory would not be proper. There is absolutely no evidence here to support a finding by this court that the defendants litigated in bad faith, or that the defense was offered without any possible basis in law or fact. Indeed, under a prior ruling of the Supreme Court of South Carolina in *Neal v. Shealy, et al.,* 199 S. E. (2) 542, 261 S. C. 266 (1973), no body politic of which any of the defendants were members had legal authority to reapportion the Union County Board of Commissioners. Because of this unique circumstance, an award of attorney's fees based upon obstinancy, or bad faith, is manifestly not warranted.

Aside from instances in which there is express statutory authorization for an award of attorney's fees, or where the parties have employed dilatory and obstinate tactics, the restrictive rule heretofore mentioned has been eroded to the extent that the great majority of courts now recognize two legal principles which are deemed appropriate exceptions to the rule which denied awards of attorney's fees under the circumstances here involved. The first exception is the "common fund" or "common benefit" theory most recently recognized by the United States Supreme Court in *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375 (1970). In *Mills,* the Supreme Court held that fees may

be awarded in a case in which "a substantial benefit" is conferred on the members of "an ascertainable class." 396 U. S. at 393. The *Mills* decision is based upon the rationale that an award of attorney's fees is proper to remedy the injustice of requiring one plaintiff to bear the entire expense of an action which resulted in benefit to a large class. In *Hall v. Cole,* 412 U. S. 1 (1973), the Supreme Court made clear that the "common fund" theory was not premised upon any obstinancy or bad faith on the part of the defendants:

> ". . . 'Fee shifting is justified in these cases; not because of any bad faith of the defendant but, rather, because to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.'" 412 U. S. at 4-5.

The *Mills* opinion was not novel, but was, in fact, an extension of the "common fund" theory established in *Sprague, supra.* In the words of one court:

> ". . . *Mills* represents a marked extension of the common fund exception to the traditional American rule, but not a radical departure. Utilizing the equitable doctrine of unjust enrichment, it merely extends the applicability of the exception to instances where a substantial 'benefit', whether pecuniary or not, is bestowed upon an ascertainable group . . ." *Gilpin v. Kansas State High School Activities Association,* 377 F. Supp. 1233, 1246 (D. C. Kan. 1974).

Judge Peckham well expressed this principle in *LaRaza Unita v. Volpe,* 57 F. R. D. 94, 97 (1972) . . . "*Mills* extended the scope of the 'common-fund' justification by holding that **no pecuniary benefit need be demonstrated** . . ." (emphasis added).

The second important element in *Mills* is recognition that an award of attorney's fees may be properly linked to efforts to vindicate congressional policy:

> ". . . (T)he stress placed by Congress on the importance of fair and informal corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders . . ." 396 U. S. at 396.

Consequently, *Mills* represents both a defensive and offensive use of the court's equitable powers—defensive, to prevent unjust enrichment of "free-riders" and offensive, to promote the effective implementation of strong congressional objectives. Thus, this court feels that the "common fund" principle of *Mills* may properly be used as a basis for the award of attorney's fees in the instant action. *Bebchick v. Public Utilities Commission,* 318 F. (2) 187 (D. C. C. A. 1963); *Brewer v. School Board of the City of Norfolk,* 456 F. (2) 943 (4 Cir. 1962); *Rolax v. Atlantic Coastline Railroad Co.,* 186 F. (2) 473 (4 Cir. 1951); *Bright v. Philadelphia-Baltimore-Washington Stock Exchange,* 327 F. Supp. 495 (E. D. Pa. 1971); *Gray v. Creamer,* 376 F. Supp. 675 (D. Penn. 1974).

The other recently developed exception to the general rule against an award of attorney's fees, and the exception this court feels is more applicable here, is the "private Attorney-General" theory. This theory is an outgrowth of the Supreme Court's holding in *Newman v. Piggie Park Enterprises,* 390 U. S. 400 (1968). In interpreting the scope of the reasonable attorney's fee provision under Title II of the Civil Rights Act of 1964, § 204(g), 42 U. S. C. § 2000 a-3(b), the Supreme Court in *Newman* found the basis of award of fees to be the encouragement of litigation to accomplish congressional objectives of eradicating racial discrimination. While *Newman* involved a suit brought under a civil rights statute which made specific allowance for attorney's fees, the following language from *Gilpin, supra,* at page 1248 of 377 F. Supp., is equally pertinent in the instant case: ". . . Relying on the private Attorney-General theory concept recognized in *Newman,* a logical extension of the benefit rationale adopted in *Mills,* and the court's traditionally broad equity powers noted in *Sprague,* the federal judiciary has of late been increasingly willing to award attorney's fees, despite strict inapplicability of the traditional exceptions and in the absence of specific statu-

tory authority . . ." In this court's view, the rule, as evolved, stated briefly, is that unless a statutory scheme can be interpreted as precluding it, a "private Attorney-General" should be awarded attorney's fees when he has effectuated a strong congressional policy which has benefited a large class of people, and where, further, the necessity and financial burden of private enforcement is such as to make an award essential.

This theory has been applied to allow an award of attorney's fees in numerous cases where, as here, jurisdiction is founded upon an alleged violation of the Civil Rights Acts of 1866, 1870, and 1871; 42 U. S. C. § 1981, § 1982, and § 1983, respectively. *Cooper v. Allen,* 467 F. (2) 836 (5 Cir. 1972); *Donahue v. Staunton,* 471 F. (2) 475 (7 Cir. 1972); *Lee v. Southern Homes Sites Corp.,* 444 F. (2) 143 (5 Cir. 1971); *Brubaker v. Board of Education,* 502 F. (2) 973 (7 Cir. 1974); *Knight v. Auciello,* 453 F. (2) 852 (1 Cir. 1972); *Jordan v. Fusari,* 496 F. (2) 646 (2 Cir. 1974); *Brandenburger v. Thompson,* 494 F. (2) 885 (9 Cir. 1974); *Gates v. Collyer,* 489 F. (2) 298 (5 Cir. 1973); *Class v. Norton,* 505 F. (2) 123 (2 Cir. 1974); *Basset v. Atlantic Independent School District,* 347 F. Supp. 1191 (E. D. Tex. 1972); *Wallace v. House,* 377 F. Supp. 1192 (D. C. La. 1974); *Dyer v. Love,* 307 F. Supp. 974 (N. D. Miss. 1969); *Martinolich v. Dean,* 256 F. Supp. 612 (S. D. Miss. 1966); *London v. East Feliciana Parish Police Jury,* 347 F. Supp. 132 (E. D. La. 1972); rev'd on other grounds, 476 F. (2) 637 (5 Cir. 1973); *Scott v. Opelika City Schools,* 63 F. R. D. 144 (M. D. Ark. 1974); *NAACP v. Allen,* 304 F. Supp. 703 (M. D. Ala. 1972); *Jinks v. Mays,* 350 F. Supp. 1037 (N. D. Ga. 1972); *Wyatt v. Stickney,* 344 F. Supp. 373 (N. D. Ala. 1972); *Lyle v. Teresi,* 327 F. Supp. 683 (D. Minn. 1971).[1] While many of these cases involve allegations of racial discrimination, an award of attorney's fees based upon the "private Attorney-General" theory is not limited to cases involving such discrimination. As the court

[1] An excellent and exhaustive survey of cases which have allowed attorney's fees in litigation alleging violation of civil rights is contained in *Attorney's Fees in Pro Bono Publico Cases,* by Mary Frances Derfner for the Lawyer's Committee for Civil Rights, Washington, D. C.

noted in *Commonwealth of Pennsylvania v. Chaleroi Area School District,* 63 F. R. D. 440, 442:

> ". . . The broad formulation of both the *Newman* and *Mills* decisions in terms of the furtherance of the public interest, whatever the particular focus of the statute involved, taken together with the broad language of § 1983 itself, seem on their face to negate the proposition that fees may be awarded only when racial discrimination is challenged . . ."

See, e.g., Natural Resources Defense Council, Inc. v. Environmental Protection, 484 F. (2) 1221 (1 Cir. 1973) (fees awarded to plaintiff seeking E. P. A. compliance with the Clean Air Amendments of 1970, 42 U. S. C. § 1857 c-5, *et seq.*); *Sierra Club v. Lynn,* 364 F. Supp. 834 (W. D. Tex. 1973) (fees awarded to plaintiff forcing compliance with the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.*); *LaRaza Unida, supra* (fees awarded to plaintiff enjoining building of highway for failure to comply with Department of Transportation Act of 1966, § 4(f), 49 U. S. C. A. § 1653(f)).

Generally, three factors must be taken into consideration in determining the propriety of the employment of the "private Attorney-General" theory as a vehicle to award attorney's fees in any given case. These factors include (a) effectuation of a strong congressional policy, (b) the necessity and financial burden of private enforcement, and (c) the number of individuals benefited by the plaintiff's efforts. *LaRaza Unida, supra,* at page 99 of 57 F. R. D.

There can be little doubt as to the presence of an effort to effectuate a strong congressional policy in the instant action. The right to exercise an unabridged electroal franchise is supported by the strongest congressional and constitutional policy. Indeed, the right to vote is the single pillar upon which our entire system of government is founded. Neither can there be doubt, under the circumstances here involved, as to the necessity of private enforcement, and the concomitant expense associated therewith, when this action was brought pursuant to 42 U. S. C.

§ 1983. In enacting § 1983, Congress sought to make certain that the protection of individual rights was not left in the hands of local authorities who were, at times, the very source of the constitutional deprivation. As the Fifth Circuit Court of Appeals noted in *Lee v. Southern Homes Sites Corp., supra,* 429 F. (2) at 295:

> "... In the area of civil rights, many cases have either allowed or implicitly recognized the discretionary power of a district judge to award attorney's fees in a proper case in the absence of express statutory provision ... **and especially so when one considers that much of the elimination of unlawful racial discrimination devolves upon private litigants and their attorneys.**" (Emphasis added) (citations omitted).

In view of the rising costs of litigation, and recognizing that many actions filed pursuant to 42 U. S. C. § 1983 do not have the potential for an award of substantial pecuniary damages, if federal courts refuse to exercise their equitable discretion to order an award of attorney's fees when such discretionary action is appropriate, then private litigation might well be stifled and denial of constitutional rights might continue unfettered. "42 U. S. C. § 1983, and its jurisdictional concomitant, 28 U. S. C. § 1343(3), represents congressional indication that federal courts should use their equitable powers to insure vindication of the rights protected by the Constitution and laws from infringement by those acting under color of state law ..." *Stanford Daily v. Zurcher,* 366 F. Supp. 18, 24 (D. C. Cal. 1973).

Finally, it is equally clear to this court that a great majority of the citizens of Union County were benefited by the plaintiff's efforts to insure that their vote was not diluted by an unconstitutional system of electing members of the Board of Commissioners of said County. In so acting, the plaintiff was vindicating congressional and constitutional policy and the general public was the ultimate beneficiary of his efforts. Members of the public who reside in the urban areas of Union County can now be assured that they are represented on the governing body of

their county on a constitutionally acceptable basis with their rural brethren. As a result of the plaintiff's efforts, the electorate of Union County can likewise be assured that their Board of Commissioners more accurately reflects the desires of all the citizens of that County. The plaintiff here, in this court's opinion, was, in the truest sense of the word, acting as a "private Attorney-General."

This court recognizes its holding in the action *sub judice* that attorney's fees may properly be awarded under certain circumstances within the exercise of the court's discretionary powers on the "private Attorney-General" theory when a reapportionment action is brought pursuant to 42 U. S. C. § 1983, may be contrary to the exact wording found in *Bradley v. School Board of City of Richmond, Va.,* 472 F. (2) 318 (4 Cir. 1972). In that case, the Honorable Donald Russell, United States Circuit Judge, writing for the Fourth Circuit Court of Appeals, rejecting the argument that attorney's fees may be awarded in the absence of statutory authorization, and in circumstances outside the traditional ambit of the *Ticonic* doctrine, stated:

> ". . . . If, however, the rationale of *Mills* is to be stretched so as to provide a vehicle for establishing judicial power justifying the employment of award of attorney's fees to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general. . . .
>
> ". . . . Apportionment suits would justify awards under this theory. . . .
>
> ". . . . Accordingly, when Congress omits to provide specially for the allowance of attorney's fees in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully, intending that the allowance of attorney's fees in cases

> brought to enforce the rights there created or recognized should be allowed only as they may be authorized under the traditional and long-established principles as stated in *Sprague v. Ticonic Bank* (1939), 307 U. S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184. Such consideration, it would seem, was the compelling reason that prompted one commentator to offer the apt *caveat* that the determination of public policy as a predicate for such awards should be more safely left with Congress and not undertaken by the Courts. . . .
> ". . . . We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts. . . ." *Bradley* at 329-331.

However, this court is convinced, based on the many cases heretofore cited, that, since *Bradley,* the law has evolved to a point that it is now appropriate to award attorney's fees under the facts of the instant case without violating any mandate of the Fourth Circuit Court of Appeals as expressed by the author of the *Bradley* opinion for whom this court has the very highest respect and admiration.

Finally, the defendants interpose the objection that an award of attorney's fees here is prohibited by the Eleventh Amendment. The Eleventh Amendment to the Constitution provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

While the constitutional language does not in its literal sense bar suits by citizens of a state against **that state,** such a prohibition has, however, been implied by settled Supreme Court precedent. *Hans v. Louisiana,* 134 U. S. 1 (1890). Even if this court were to find that defendants here were state officials, an award of attorney's fees may be permissible under the principles set forth recently in *Class v. Norton,* 505 F. (2) 123 (2 Cir. 1974). In *Class,* a panel

of the Second Circuit Court of Appeals held that the Eleventh Amendment did not bar an award of attorney's fees against a state official because such award was "ancillary" and was the "necessary result of compliance with decrees which by their terms were prospective in nature." *Class,* at 505 F. (2) 123, quoting *Edelman v. Jordan,* 415 U. S. 651 at 667-668.[2]

However, this court, in awarding attorney's fees against the defendants here, is assessing Union County, and not the State of South Carolina, under the equitable authority which this court possesses. It is well settled that a county and, thus, county officials are not extended the protection of the Eleventh Amendment which is generally given to state and state officials. *Lincoln County v. Luning,* 133 U. S. 529 (1890); *Moor v. County of Alemeda,* 411 U. S. 633 (1973); *Edelman v. Jordan,* 415 U. S. 651, 94 S. Ct. 1346 (1974). The Supreme Court in *Edelman, supra,* discussed the well recognized judicial test whereby the propriety of invoking Eleventh Amendment immunity is determined:

> ". . . It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. '(W)hen the action is in essence one for the recovery

[2] A number of courts have cited the case of *Sims v. Amos,* 336 F. Supp. 924, 340 F. Supp. 691 (M. D. Ala.) aff'd 409 U. S. 942, as authority for the proposition that an award of attorney's fees against state officials is not violative of the Eleventh Amendment. Much controversy has arisen over the precedental value of the Supreme Court's summary affirmance in that case. *See, e.g., Taylor v. Perini,* 402 F. (2) 899, 907 (6 Cir. 1974) (Edwards, J., dissenting). The concurring opinion of Chief Justice Burger in *Fusari v. Steinburg,* — U. S. —, 43 L. W. 4121, 4125, raises substantial doubt in this court's mind as to the precedental value of any summary affirmance:

> ". . . When we summarily affirm without opinion the judgment of a three-judge district court we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established . . ." (citations omitted).

Based upon the above-quoted language, this court believes that to base an award of attorney's fees upon *Sims* would be ill-advised and unwarranted.

> of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Thus, the rule has evolved that a suit by private parties seeking to impose liability which must be paid from the public treasury is barred by the Eleventh Amendment." *Edelman,* at 1355, 1356 (citations omitted).

Applying the test enunciated in *Edelman,* it seems clear to this court that an award of attorney's fees to the plaintiff against the defendants in their official capacity is not barred by the Eleventh Amendment. The award here, as aforesaid, will not be paid from state coffers, but is directed against the treasury of Union County, since the defendants are county officials who have been sued only in their representative capacity, *Harper v. Kloster,* 486 F. (2) 1134, 1138 (4 Cir. 1973),[3] and, thus, it will be county funds and not state funds which are expended.

Having determined that an award of attorney's fees is proper and within the equitable power of the court in the instant action, and having decided that the Eleventh Amendment does not bar such an award, the court must determine an appropriate amount for attorney's fees. This court has in the past, in instances in which attorney's fees were to be awarded, consistently adhered to the policy that counsel should be paid concomitantly with the quality of representation provided the parties involved. In the instant case, this court is of the opinion that counsel for the plaintiff were exemplary in their representation and advocacy of the plaintiff's cause. The excellent briefs submitted by plaintiff's counsel were indicative of many hours spent by counsel in legal research of this somewhat novel issue. However, there is one element which the court must recognize in determining the amount of the fee here; any award of attorney's fees will, as noted, be taxed against the defendants in their official or representative capacity and, thus, such fees must be paid by the county treasury of Union County, and, ultimately, by the taxpayers who

[3] *Cf., Moye v. City of Raleigh,* 503 F. (2) 631, 635, n. 11.

reside therein. Because of this fact, the court, in determining the amount of the attorney's fee, is compelled to be more conservative than in circumstances in which such an award was not to be paid from public funds.

In their motion for award of attorney's fees, counsel for the plaintiff avers that in litigation of the instant action, they incurred $1,369.58 in necessary expenses, and they seek reimbursement in this amount plus a fee of $13,-158.00 on a basis of 354¼ hours of their time expended in handling this suit. The court feels it is proper to award expenses in the aforementioned amount to plaintiff's counsel. In addition, after a thorough review of the entire record, this court has determined that attorney's fees in the amount of $5,000.00 should be awarded to counsel for plaintiff. Therefore, it is

ORDERED, that the plaintiff be, and he hereby is, awarded attorney's fees and expenses in the total amount of $6,369.58 against the defendants herein in their representative capacity only and said defendants are hereby directed to pay said amount directly to the attorneys for the plaintiff.

AND IT IS SO ORDERED.

TRUE COPY
Test:

MILLER C. FOSTER, JR.,
Clerk.

/s/ MARGARET TRUESDALE,
By: Deputy Clerk.

/s/ SOL BLATT, JR.,
United States District Judge.

Charleston, South Carolina
January 24, 1975

APPENDIX E

Civil Action No. 74-237

ORDER

On May 15, 1974, this court filed its Order in which it held unconstitutional the residency provision contained in 338 South Carolina Joint Acts and Resolutions 555, as amended, which Act provides for the election of the Union County Township Commission, and directed that the primary and general elections for the year 1974 for Union County Township Commission should be conducted by having all candidates run at-large on a county-wide basis with no township residency requirement imposed on any candidate. In this Order, the appropriate county officials were directed to give notice of this change in the scheme for electing the Union County Township Commission and to provide, under applicable state law, for the acceptance of filings of candidates who sought election under the court Order. While the Democratic party of Union County is the only political party holding primary elections for membership on the Union County Township Commission, and no official of this political party is a party to this action, the court was assured by counsel that the officials of the Democratic party of Union County would comply with the terms of the Order providing for the election of the Township Commission, such being indicated in this court's Order of May 22, 1974, in this case.

An expedited appeal to the Fourth Circuit Court of Appeals was granted in this case, and that court, on June 17, 1974, affirmed the Order of this court invalidating the residency provision for the election to the Union County Township Commission but reversed the transitional remedy established by this court for use in the current election to be held July 16, 1974. The cause was remanded to this court for implementation of a plan containing residency requirements for some of the Township Commissioners, with additional "floater" representatives having no residency requirement to compose the remainder of the Commission, all of said representatives to be elected by at-large voting. Counsel and this court received the opinion

of the Court of Appeals on June 19, 1974, and counsel for both parties have this date provided the court with several plans which they deem consonant with the principles established in the opinion of the Court of Appeals.

After reviewing with counsel the various plans submitted, this court feels that a plan would best serve the citizenry of Union County wherein five Commissioners are elected with residency requirements and three Commissioners are elected without residency requirements. Such a plan has been devised that contains extremely limited population variances and which does not allow the townships in which either a majority or a minority of the people reside to control the Township Commission without the votes of the "floater" representatives, and, in this court's opinion, such plan accomplishes the result mandated by the opinion of the Court of Appeals. This plan, which might be designated, following the wording of *Dusch v. Davis,* (1967) 387 U. S. 112, as a "5-3 plan", is as follows:

District	*Township*	*Population*	*Seats*	*Variance*
1	Jonesville and Bogansville (996)	5,454	1	–6.7%
2	Cross Keys, Union, and Goshen Hill (891)	18,433	3	+5.1%
3	Fishdam, Santuck, and Pinckney	5,343	1	–8.6%
At-large	.....	.....	3	.....

TOTAL VARIANCE—13.7%

The court is advised by counsel that a number of candidates have filed for election to the Union County Township Commission under the terms of its earlier Order and that an Order providing for candidate filing within one week under the plan provided herein will allow sufficient time for any citizen of Union County to qualify for election. Based on the foregoing, it is

ORDERED, that the defendants herein shall immediately give public notice for two days in the daily newspaper published in Union County that any person wishing to file as a candidate for Union County Township Commission, under the terms of this Order, shall have that right until 12 o'clock noon on Saturday, June 29, 1974, and the defendants herein shall make provision under applic-

able state law to accept these filings which might be made by any such candidates.

IT IS FURTHER ORDERED, that all filings for Union County Township Commission heretofore made under statutory law, or under the earlier Order of this court, are nullified and voided, and the appopriate officials are directed to return to any one who has so filed the filing fee paid.

IT IS FURTHER ORDERED, that candidates filing for Union County Township Commission under the terms of this Order shall file either to run at-large, or for one of the resident township seats, and no candidate shall file for both a resident seat and an at-large seat.

IT IS FURTHER ORDERED, that all provisions of the Order of this court dated May 15, 1974, not inconsistent with the opinion of the Fourth Circuit Court of Appeals in this case dated June 17, 1974, nor with the terms of this Order, are hereby reaffirmed.

Charleston, South Carolina
June 21, 1974

/s/ SOL BLATT, JR.,
United States District Judge.

TRUE COPY
Test:

MILLER C. FOSTER, JR.,
Clerk.

/s/ HELEN BREELAND,
By: Deputy Clerk.

APPENDIX F

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 74-1619

ROBERT LYTLE, APPELLEE,

versus

COMMISSIONERS OF ELECTION OF UNION COUNTY, ET AL., APPELLANTS

AND

THOMAS C. McCAIN, ET AL., APPELLEES,

versus

CHARLES E. LYBRAND, ET AL., APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG AND GREENWOOD. SOL BLATT, JR., DISTRICT JUDGE.

Argued: June 4, 1974 Decided: June 17, 1974

Before CRAVEN, RUSSELL and FIELD, Circuit Judges

PER CURIAM:

The plaintiffs in these two cases challenge the constitutional validity of the statutory provisions for the election of the members of the Boards of Control [1] of Union

[1] The Board of Township Commissioners and County Supervisor constitute "the governing board of Union County." § 14-3464, Code of Laws of South Carolina, 1962, as amended by 52 Stat. Act No. 860 at 2152 (1962).

The County Council is the governing body of Edgefield County. 57 Stat. Act No. 521 at 989 (1971).

and Edgefield Counties, South Carolina.[2] In both Counties the members of these governing Boards are elected at large but each member must reside in separate fixed districts of the County. The districts vary in population—substantially so in Union County—and in classification between urban and rural. Because both actions involved the same legal principles, they were consolidated for hearing and were disposed of in a single decree in the District Court and have been heard in this Court together.

In its decree, the District Court held that, since the several districts in the two Counties were "of unequal proportion" in population and "finding neither rational nor compelling circumstances justifying the formation of the unequally populated districts", the residency requirements for members of the two Boards were "violative of the 'one-man, one-vote' principle and are constitutionally unacceptable." It granted the Counties until May 1, 1975 to enact a plan for the election of the members of the two Boards that would comply with the constitutional standards as it had stated them and ordered by way of temporary relief that the nomination and election of such members for the currently slated 1974 election be at large without any residency requirements. In order to make effective this latter remedy, it ordered reopened the filing date of candidates for nomination in the party primaries to be held on July 16, 1974.

The defendants have appealed and, in connection therewith, have sought from the District Court a stay of its order pending disposition on the merits. When that application was denied, they applied to this Court for a stay under Rule 8(a), F. R. A. P. At the hearing on the motion to stay, it was agreed that the motion for a stay and a hearing of the appeal on the merits could be appropriately heard together and a determination on the merits would be dispositive of the motion to stay. We proceed accordingly to a consideration of the merits of the controversy.

The Supreme Court has not decreed absolute rigidity in the application of the "one-man, one-vote" rule as enun-

[2] 338 S. C. Joint Acts and Resolutions 555, as amended; and 14-1850, Code of Laws of South Carolina, 1962, as amended.

ciated in *Wesberry v. Sanders* (1964) 376 U. S. 1, and succeeding cases, to elections to public office at all levels of federal and state government. In congressional elections, for instance, "only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown" are constitutionally permissible. *Kirkpatrick v. Preisler* (1969) 394 U. S. 526 at 531. Recognizing that such a rule of equal representation could not be automatically applied to local government, and, if applied, might "impair the normal functioning of state and local governments", the Court substantially relaxed the rule of mathematical exactness for the election of state legislators in *Mahan v. Howell* (1973) 410 U. S. 315, at 323. In so doing, it accepted the argument that "maintaining the integrity of political subdivision lines" in such elections "is a rational one" and will justify some departure from the rule adopted in *Preisler* of congressional elections.[3] The "absolute rule" of *Preisler* has been even further relaxed by the Court in its review of the constitutionality of representational structures at the strictly local governmental level, such as is involved in this case. *Cf., Salyer Land Co. v. Tulare Water District* (1973) 410 U. S. 719. In these circumstances it was accepted that "each citizen's constitutional right to equal representation must be reconciled with the need for flexibility in designing local structures." Note, *72 Mich. L. Rev.* 869 (1974). Accordingly, in *Dusch v. Davis* (1967) 387 U. S. 112, it was held that local government officials elected at large may validly be required to be residents of particular areas or districts within the local governmental unit, even though such areas or districts have wide populational variances. Such decision recognized the wisdom of creating an institutional framework of local government that would assure "that councilmen with knowledge of the particular problems of each of the heterogeneous boroughs would be serving on the council." Note, 81 *Harv. L. Rev.* 154. And, because the local unit had a mixed economic base, the guaranty of regional representation under a system of equal voting represented "a sound compromise between urban

[3] 410 U. S. at 329.

and rural interests at the local level"[4] and, just as the maintenance of "the integrity of political subdivision lines" provided a rational basis for the population variances in *Mahan,* so this attempt to balance urban and rural interests provided a rational basis for the addition of the residence requirement for candidates under a plan of at-large voting. Such a plan does not violate the rationale of the "one-man, one-vote" cases. Its residence requirement constitutes only a basis for qualification of candidates, not for voting or representation.[5] What it seeks is the avoidance of that "uniform straitjacket * * * in devising mechanisms of local government suitable for local needs and efficient in solving local problems", deplored in *Avery.*[6] As a matter of fact, the members, elected at-large, are answerable to and are representative of the entire constituency. The value of the residency provision, though, is that it provides an additional mechanism whereby territorial interests may be articulated through a representative who, though elected by the voters of the County as a whole, has a unique awareness and understanding of the problems and interest of the subdivision. This is a legitimate interest to be considered in fashioning a plan of local government.

Of course, there are limits to this electoral flexibility for local governmental units. When the residential areas are so drawn as to make it possible for the minority in numbers, whether it be urban or rural, to control the governing board, such an arrangement will transcend the con-

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[4] 81 *Harv. L. Rev.* 155.

This idea was expressed by the Court itself in these words [387 U. S. at 117]:

> "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside."

[5] For a recent statement of the value of the residency requirement in situations such as is present here, *see* Bilzin, *Reapportionment in the Sub-State Level of Government: Equal Representation or Equal Vote,* 50 *Boston U. L. Rev.* 231, 251:

> "The problems involved in creating effective representation involve more than merely shifting numbers; the use of techniques such as residency requirements may prove beneficial. Members elected under this type of requirement tend to be men of broader backgrounds, more accessible to their constituencies, better informed and more sensitive to the needs of the various districts than those who are not."

[6] *Avery v. Midland County, Texas* (1968), 390 U. S. 474 at 485.

stitutional bounds authorized under *Dusch.* The heart of *Dusch* is its approval of a "rational" balancing of interests, with appropriate regard for the distribution of population, in the constituency of the local governing board. It assumes the fairness of a scheme that allows some force to territorial interests, but at the same time it requires that the accommodation of territorial interests shall not nullify what are the proper rights of the majority in population. Accordingly, if the plan of election arbitrarily overbalances rural over urban or *vice versa,* judicial remedy is available. It was because of such a situation that an earlier plan involving the governmental unit in *Dusch* was judicially disapproved and the "Seven-Four" plan was devised.

The plaintiffs assert that any plan that detracts in any particular from an absolute rule both for voting and for residence of candidates is invalid. In the context of fixing the structures of local governmental units there may be relaxation of the absolute rule, if the reason therefor is as stated in *Mahan,* "rational". An attempt through a residency requirement to strike a balance between the interests of the rural and urban areas in a county, provided voting rights for both areas are protected by at-large elections, meets the "rational" test. The plaintiffs, however, argue that if the defendants wish to support the residency requirement by this type of balancing, they are obligated to assert such claim affirmatively in their pleadings and to sustain it with proof. They contend the defendants have made no such affirmative showing. However, it is obvious from an official map of the two counties and the listing of the populations in the several districts of the political units that there are urban and rural areas fairly well defined in the counties involved. Thus, Union district, with over 58% of the County's population qualifies as an urban area; similarly, Goshen Hill district, with a population of 561, would be fairly characterized as agricultural. These are merely common-sense deductions from admitted facts. It thus takes no elaborate record to establish what is so manifestly obvious and what is actually inherent in the plaintiffs' own argument; *i.e.,* that the several plans deal with and seek to establish some sort of accommodation between

urban and rural interests. *Dusch* declares such an attempt at adjustment between varying interests in a local unit is "rational" and valid.

It remains to ascertain whether the residential requirements for representation as devised in the statutes under review represent a proper constitutional balance of these urban and rural interests. To determine this, we must examine the workings of the plan in each county separately. So examined, we conclude the plan followed in Union County will not meet constitutional standards. There is no "Seven-Four" plan here such as there was in *Dusch*. The urban area as represented by the Union district, with, as we have observed, 58% of the County's population, is entitled to but a single resident member on the eight-man Board. Stated more particularly, Union District, with a population of 17,127, and Goshen Hill District, with a population of 561, would, under the statute challenged, have the same residential representation on the Board of County Control. There are no "floating" members as in *Dusch* to compensate for the very substantial variations in population among the districts. The District Court properly, therefore, found under these circumstances that the statutory plan of selection in Union County was invalid.

It does not follow, however, that, because the present statutory scheme in Union County is invalid, the proper temporary or transitional remedy is the complete invalidation of the residence requirement for the approaching election, while affording the legislature an opportunity to develop its own plan between now and 1975. After all, there is an obligation on the Court to fashion even its transitional remedy by taking into consideration what obviously was the legislative purpose in devising the plan it did and to depart as little from that purpose as constitutional principles will permit. To strike down completely all residence requirements would mean that the urban area of Union could completely dominate and control the Board, leaving the rural areas of the County without any representative to voice their peculiar and unique territorial interests. That was a result the legislature manifestly sought

to avoid. In decreeing transitional relief, the Court should not disregard that legislative purpose. Accordingly, the remedy adopted should be one that recognizes and gives proper effect to the population variances among the districts as well as the economic differences among them. It was the virtue of the *Dusch* plan that it did exactly that. It accomplished that result by requiring a number of "floater" representatives, without any residence requirements, while retaining a certain number of representatives with residence requirements. Under the plan, the urban areas, which represented the majority in population, could conceivably achieve a numerical majority on the Board but the rural areas, despite their minority in population, were assured reasonable representation for the representation of their interests on the Board. That, it seems to us, should be the transitional remedy ordered in the *Union* case. A "Four-Four" plan is readily adaptable to the situation and will achieve the same kind of fairness as resulted from the plan approved in *Dusch*. Specifically, four members of the Board would be nominated and elected without residence requirements and four would be elected with residence requirements. The resident requirement for the latter four would contemplate that the eight districts in the County should be grouped by combining two districts and by providing that each such group of two districts should be entitled to have as a member of the Board one of its residents, elected, of course, by the voters of the entire County. In making the groupings, the most populous district might first be coupled with the least populous, and in the subsequent groupings, the same procedure of joining the most populous district then remaining with the least populous would be followed. This is purely a suggestion and the parties are at liberty to submit any alternative plan to the District Court that may be deemed consonant with the principles set forth herein, provided they act promptly and do not delay unduly the electoral processes.

This remedy, it should be observed, is only decreed for the approaching election. It is not intended to be a permanent plan for the election of the members of the

Board. A permanent plan should be a legislative responsibility and only in default of any valid legislative action should the judiciary interfere. It should be remarked, too, that there is no claim of any racial discrimination claimed to result from the present statutory plan.

As a result of our **modification** of the plan adopted by the District Court for the approaching election, it will be necessary to provide for the reopening of the election machinery for the election of members of this Board in Union County. To the end that this may be done promptly and expeditiously, this cause will be remanded to the District Court to enter such administrative orders as may be appropriate and, in order that such Court may not be delayed in discharging this responsibility, the mandate herein shall issue forthwith.

So far, we have dealt only with the Union County plan. We are of the opinion that the Edgefield County plan, as presently provided by statute, represents a proper balancing of interests and without such population variances among the districts as to require the deletion on constitutional grounds of the residence requirements imposed by the statute under attack. There is not the wide disparity in population among the districts as was the case in Union County. It is not obvious that a minority, either in numbers or in territorial or economic interest, can dominate the Board. The several districts are of sufficient size and numbers that a residence requirement does not appear to be an irrational method of achieving a form of county government, elected by all the voters of the County but, through its residence requirement, assuming some attention to territorial interests. We conclude, therefore, that the District Court was in error in invalidating the statutory election procedure for the members of the Edgefield County Board.

The decree of the District Court invalidating the statutory provisions for the election of members of the governing board of Union County is accordingly affirmed, but the transitional remedy for use at the current election of members of such Board is reversed, and the cause is remanded to the District Court with directions for the entry

of an order for transitional or temporary relief as hereinbefore stated.

The decree of the District Court invalidating the statutory provisions governing the election of members of the Edgefield County Council is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX G

Civil Action No. 74-237

ORDER

In the above entitled actions, which are generally cognizable under 42 U. S. C., Section 1983, the plaintiffs seek a reapportionment of the eight-member Township Commission—(Union County, C/A 74-237)—and the five-member County Council—(Edgefield County, C/A 74-281).

In Civil Action No. 74-237—(hereinafter "Union County")—the cause of action has its genesis in an Act passed by the South Carolina Legislature in 1939, establishing the Union County Township Commission system—(338 South Carolina Joint Acts and Resolutions 555)—under which Act Union County was then divided into eight townships of varying area and population. As a result of amendments thereafter enacted, it is now mandatory that one member of the Commission be elected to represent each of the eight townships and that such member be a resident of the township from which he is elected. While each member must reside in a particular township, all members are elected "at large", that is, all of the voters of Union County select the members of the Commission, not the voters alone in the township represented by a particular Commissioner. The plaintiff attacks this system solely on the "one-man, one-vote" theory enunciated in many decisions of the United States Supreme Court, commencing with *Baker v. Carr,* 369 U. S. 186 (1962); *Wesberry v. Sanders,* 376 U. S. 1 (1964); and *Reynolds v. Simms,* 377 U. S. 533 (1964); to the more recent cases of *Avery v. Midland County, Texas,* 390 U. S. 474 (1968); and *Hadley v. Junior College District,* 397 U. S. 50 (1970).

It appears in "Union County" that there is a population deviation of at least 432 percent from the smallest population township to the largest population township, and the plaintiff contends that 21 percent of the people of Union County, this being the percentage of citizens who live in the five smallest population townships, elect and control five of the eight township Commissioners and that any election scheme which allows such a result constitutes an invidious discrimination against those citizens who comprise the greater part of the electorate but are represented by a minority of the governing board. The plaintiff in "Union County" seeks a declaratory judgment holding the present system of election of Union County Township Commissioners to be violative of the rights of the plaintiff and others similarly situated, and he seeks an Order from this court delaying the election of Township Commissioners in the oncoming primary elections, now scheduled for July 16, 1974, and in the general election scheduled for November, 1974, until an appropriate reapportionment plan has been implemented which complies with the "one-man, one-vote" edict of the Supreme Court, said plan to be devised by this court, or effectuated by action of the General Assembly of South Carolina with approval of the United States Department of Justice under the provisions of the 1965 Voting Rights Act.

In Civil Action No. 74-281—(hereinafter, "Edgefield County")—the cause of action arises from an Act of the South Carolina Legislature passed originally in 1966 and amended in 1971—(§ 14-1850 of the 1962 Code of Laws of South Carolina, as amended)—establishing the Edgefield County Council, under which Act Edgefield County was divided into five districts of varying area and population, with the identical residency requirement and "at-large" voting method as that under attack in the "Union County" case. "Edgefield County" differs in two factual respects from "Union County" insofar as population is concerned in that the maximum population deviation in the districts is only 72 percent, and approximately 44 percent of the population is required to elect three of the five Councilmen. Additionally, the plaintiffs in "Edgefield County" attack not only violation of the "one man, one-vote principle, as does the plaintiff in "Union County", but the plaintiffs in "Edgefield County", all being black citizens of that county, contend that the election scheme there discriminates against them and other black citizens on account of their race. These plaintiffs seek substantially the same relief as that sought by the plaintiff in "Union County."

Focusing attention first on the "one-man, one-vote" principle under attack in both cases, the plaintiffs and the defendants move for summary judgment on this issue in each case under Rule 56 of the Federal Rules of Civil Procedure, and all parties have filed the necessary affidavits and supporting data upon which to base their respective motions.

Election plans based on "at-large" voting with residency clauses, such as are here involved, have been reviewed by various courts; but very few courts have faced the exact issues raised in the instant cases. The first case of consequence in this field was *Fortson v. Dorsey,* 379 U. S. 433 (1965), in which the United States Supreme Court upheld the use of an electoral system that combined multi-member districts and residency requirements, which system was used in the election of state senators in the State of Georgia. In that case, **there was no substantial population deviation in the senatorial districts involved,** and the Supreme Court stated, in upholding the residency requirement applicable to the large multi-district counties, beginning at page 436 of 379 U. S.:

> "It is not contended that there is not 'substantial equality of population' among the 54 senatorial districts. The equal protection argument is focused solely upon the question whether county-wide voting in the seven multi-district counties results in denying the residents therein a vote 'approximately equal in weight to that of' voters resident in the single-member constituencies. Contrary to the District Court, we cannot say that it does. There is clearly no mathematical disparity. Fulton County, the State's largest constituency, has a population nearly seven times larger than that of a single-district constituency and for that reason elects seven senators. Every Fulton County

voter, therefore, may vote for seven senators to represent his interests in the legislature. But the appellees assert that this scheme is defective because county-wide voting in multi-district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted. But this is only a highly hypothetical assertion that, in any event, ignores the practical realities of representation in a multi-member constituency. It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator. If the weight of the vote of any voter in a Fulton County district, when he votes for seven "senators to represent him in the Georgia Senate, is not the exact equivalent of that of a resident of a single-member constituency, we cannot say that his vote is not "approximately equal in weight to that of any other citizen in the State'." *Fortson,* at 436, 437, 438.

Two years following the *Fortson* decision, the United States Supreme Court was faced with a relatively similar situation in *Dusch v. Davis,* 387 U. S. 112 (1967). In the *Dusch* case, the Supreme Court was confronted with an election scheme analogous to that in *Fortson* and the instant cases. The City of Virginia Beach, Virginia, consolidated with adjoining Princess Anne County, which merger resulted in a combination of rural and urban areas, and a borough form of government was adopted. Under this plan, the new City of Virginia Beach, voting "at-large", elected eleven councilmen, seven of whom were required to reside in each of the city's seven boroughs, and

four of whom were elected without regard to residency. Since the population of the seven boroughs ranged in number from 733 to 29,048 persons, this "Seven-Four Plan", as it was denominated, was attacked as violative of the "one-man, one-vote" concept. The Supreme Court, however, found the plan comparable to the scheme approved in *Fortson, supra,* and held that this "Seven-Four Plan" did not constitute "invidious discrimination."

> "The Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen is elected by a vote of all the electors in the city. The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. In upholding a residence requirement for the election of state senators from a multi-district county we said in *Fortson v. Dorsey,* 379 U. S. 433, 438:
>
> > 'It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.'
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> "By analogy the present consolidation plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' He is nonetheless the city's, not the borough's, councilman. *In Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that *Rey-*

nolds v. Sims controls, the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination. 377 U. S., at 561. As stated by the District Court:

> 'The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area.'
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> • • •
>
> '(T)he history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wide cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster.'

> "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside. Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is *Reversed.*" *Dusch,* at 115, 116, 117.

The defendants here contend that, in approving this "Seven-Four Plan", the Supreme Court gave its blessing to a scheme of operation with a maximum population deviation exceeding 365 percent and these defendants urge that Dusch permits wide variances in population among districts within a political entity when the election process, even with residency requirements, involves at-large elections and when there are valid, noninvidious reasons for the formation of the particular residential districts. Thus, these defendants insist that the residency provisions of the Edgefield County and Union County plans are not unconstitutional under the "one-man, one-vote" mandate.

Following *Fortson* and *Dusch,* the United States Supreme Court decided *Hadley v. Junior College District,* 397 U. S. 50 (1970), a case in which eight school districts in Kansas City, Missouri, combined to establish a consolidated Junior College District and to elect six trustees to conduct and manage the affairs of that district, a practice allowed under Missouri law. The trustees in this plan were required to be residents of the district from which they were elected and they were elected by the residents of their particular district, not under an at-large scheme. Because the plan discriminated in favor of certain of the smaller populated school districts, the Supreme Court held the plan to be unconstitutional and, in that connection, stated:

> "In this particular case, the 'one-man, one-vote' principle is to some extent already reflected in the Missouri statute. That act provides that if no one or more of the component school districts has 33 1/3% or more of the total enumeration of the junior college district, then all six trustees are elected at large. If, however, one or more districts has between 33 1/3% and 50% of the

total enumeration, each such district elects two trustees and the rest are elected at large from the remaining districts. Similarly, if one district has between 50% and 66 2/3% of the enumeration it elects three trustees, and if one district has more than 66 2/3% it elects four trustees. This scheme thus allocates increasingly more trustees to large districts as they represent an increasing proportion of the total enumeration.

"Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the Act necessarily results in a systematic discrimination against voters in the mere populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particular large district has exactly 33 1/3%, 50%, or 66 2/3% of the total enumeration it will always have proportionally fewer trustees than the small districts. As has been pointed out, in the case of the *Kansas City School District* approximately 60% of the total enumeration entitles that district to only 50% of the trustees. Thus while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more. Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case. We would be faced with a different question if the deviation from equal apportionment presented in this case resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small

number of trustees among a limited number of component districts. We have said before that mathematical exactitude is not required, *Wesberry, supra,* at 18, *Reynolds, supra,* at 577, but a plan that does not automatically discriminate in favor of certain districts is. **"In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme that required that candidates be residents of certain districts that did not contain equal numbers of people.** *Dusch v. Davis,* 387 U. S. 112 (1967). **Since all the officials in that case were elected at large, the right of each voter was given equal treatment."** *Hadley* at 56, 57, 58. (Emphasis ours.)

Because of the approval in *Hadley* of the *Dusch* principle, the defendants in both "Union County" and "Edgefield County" urge that the election scheme in each instance meets the constitutional requirements established in *Dusch* and reaffirmed in *Hadley.*

Counsel for plaintiffs and defendants in both cases, and this court in conducting its independent research, have uncovered only three cases in which the factual situation is identical to the cases here under review; two of these cases, *Mays v. Teague,* 341 F. Supp. 254 (E. D. Tenn., 1972), and *Davis v. Thomas County,* 380 F. (2) 93 (5 Cir., 1967), support the argument advanced by the defendants, while the third case, *Keller v. Gilliam,* 454 F. (2) 55 (5 Cir., 1972), supports the argument of the plaintiffs.[1] In *Davis v. Thomas County,* in a brief opinion, the Court of Appeals for the Fifth Circuit, approved an election plan for the selection of eight members of the Board of Com-

[1] *Twiggs v. West, et al.,* C/A Nos. 71-1106, 71-1123, and 71-1211 (D. C. S. C., 1971), involving the reapportionment of the State Senate of South Carolina, touches on but does not meet the issue here involved, and in *Dessauer, et al. v. England, et al.,* C/A 70-1076, (D. C. S. C., 1970), the issue confronting this court was apparently decided without controversy or contest.

missioner of Roads and Revenues of Thomas County, Georgia, in which this county was divided into five districts whose commissioners were chosen at-large but wherein, because of residence requirements, one district with a population of 20,492 people was represented by only two commissioners, while the remaining four districts, with a total population of only 13,827, were represented by six commissioners. In affirming the dismissal of the complaint in that case by the District Court, the Court of Appeals for the Fifth Circuit, at page 94 of 380 F. (2d), held that such dismissal was clearly vindicated by the opinion of the United States Supreme Court in *Dusch*. Likewise, the United States District Court for the Eastern District of Tennessee in *Mays v. Teague,* upheld the constitutionality of a plan to elect a County Board of Education of seven members, one of whom was required to live in each of seven school districts, which varied in population from 450 to 2,353 people, but who were elected at-large by the entire county. The District Court, basing its holding on *Dusch* and *Fortson,* found the plan constitutionally acceptable and distinguished *Hadley* in that *Hadley* did not provide an "at-large" plan for voting. However, the District Court in *Mays* cited that part of *Hadley* reaffirming the principle of *Dusch,* as additional authority for its decision that the plan in *Mays* met constitutional muster.

In January, 1972, four and one-half years after the Fifth Circuit Court of Appeals opinion in *Davis,* and two months prior to the District Court's opinion in *Mays,* the Fifth Circuit Court of Appeals decided *Keller v. Gilliam,* which case, **on identical facts,** reversed the holding in *Davis* without ever mentioning *Davis* in the opinion.[2] In *Keller,* the District Court, in fashioning a plan to replace a scheme that it had held to be unconstituted involving the election of a Board of Supervisors for Lowndes County, Mississippi, divided the county into five districts and directed that the new Board of Supervisors be elected at-large with the requirement that each elected supervisor be

[2] Oddly enough, the District Court in *Mays* did not cite in its opinion either *Davis* or *Keller,* a readily understandable fact in view of the confusion created by these two entirely different decisions from the Fifth Circuit on an identical factual matter.

a resident of one of the five districts. Three of these districts contained only 27.3 percent of the population of the county and, thus, a majority of the Board would represent a small minority of the residents of Lowndes County. Furthermore, the population variance from the largest to the smallest district was 24,849 to 2,213 persons. In rejecting this plan of the District Court, the Court of Appeals for the Fifth Circuit adopted the view that the principles enunciated in *Fortson* and *Dusch,* so strongly relied upon by the defendants here, must be read within the factual setting peculiar to those two cases.

> "It must be borne in mind that we do not have here a case in which a number of candidates are to be chosen from several **equally** populated districts but are to be voted on by all of the voters of the governmental body, such as was dealt with in the statement of the Supreme Court in *Fortson v. Dorsey,* 379 U. S. 433. 85 S. Ct. 498, 13 L. Ed. (2) 401 (1965). The court found no cause for criticism of an at large vote by all of the electors of a county for more than one senator, so long as one senator was required to stand for election from each of the separate districts. No attack was made in *Fortson v. Dorsey* on the equality of the population of the different districts.
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> "Neither do we have a case similar to *Dusch v. Davis,* 387 U. S. 112, 87 S. Ct. 1554, 18 L. Ed. (2) 656 (1967), where there was a city council election in the newly consolidated city of Virginia Beach (formerly consisting of the city of Virginia Beach and all of the rest of Princess Ann County, Virginia) under what was known as the 'seven-four plan.' This plan required that there should be an eleven man council to be elected at large by all the voters in the city's seven boroughs; four of the councilmen could reside anywhere in the city, but each of the other seven had to live in a different one of the seven boroughs. These boroughs range in population from several hundred to 38,000 in size. The Supreme Court reversed the action of the Court of Appeals for the Fourth Circuit, which had held the plan was contrary to the 'true thrust' of the

'one-man, one-vote' principle of *Reynolds v. Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2) 506 (1964) and 'its kin.'

"What was clear in the Virginia Beach (*Dusch*) case is that there was no combination by which representatives residing in the districts comprising a minority of the population could combine to work their will over the majority residing in the heavier populated precincts, except with the concurrence of some of the four councilmen who could reside in any of the boroughs and who were elected at large. Quite the contrary is obviously true here. The three smallest (coincidentally, also rural, as distinguished from urban) districts have a total population of just over 22% of the county. Thus, the three supervisors resident in them can prevail in any vote of a five-member Board. The other two supervisors who reside in the remaining two districts could not prevail on any Board vote, although possessing nearly three-fourths of the population of the county.

"We note that the Supreme Court drew attention to this special circumstance by quoting from the decision of the district court, which had approved the plan. 'The plan does not preserve any controlling influence of the smaller boroughs. . . .' Moreover, in footnote 5 the court says, 'It is obvious that, if the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside (the two most populous boroughs), if united in their efforts, could elect all 11 councilmen even though the election were at large.' It is equally true that Lynnhaven and Bayside, either with or without Kempsville (another populous borough) could elect a clear majority of the councilmen by adding their three to the four to be chosen at large. Thus, it is clear, that there was no opportunity in the *Virginia City* case for the thinly populated rural area to dominate the council as against the three or four predominately urban areas under the 'seven-four plan.'

"It is also significant that the court noted the finding by the district court to the effect that 'the history—past and present—of the area and population now comprising the city of Virginia Beach demonstrates the compelling need, **at least during an appreciable transition period,** for knowledge of rural problems and handling the affairs of one of the largest area-wide cities in the United States.' (Emphasis added.) It will be noted that the offices which are involved in the case before us here are the offices of county supervisors, the responsibilities of which have in no wise changed over the years. The supervisors continue to handle the county affairs involving both rural and urban areas." 454 F. (2) 56, 57.

This court, faced with a choice between the decisions in *Davis* and *Mays* on the one hand, and *Keller* on the other, adopts the logic and reasoning advanced by the *Keller* court. Finding the population districts in Union County and Edgefield County of unequal proportion—(substantial equality being the basis for the approval of the plan in *Fortson*)—and finding neither rational nor compelling circumstances justifying the formation of the unequally populated districts—(such rational and compelling circumstances being the basis for the approval of the plan in *Dusch*)—this court is of the opinion that the residency provisions of the plans here involved are violative of the "one-man, one-vote" principle and are constitutionally unacceptable.

> "(I)n holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the states will be inhibited in finding ways to insure that **legitimate political goals of representation is achieved.**" 397 U. S. 50, at 58. (Emphasis ours.)

"Legitimate political goals", if such existed in these cases, would lend support to the position of the defendants, but finding no such "goals" from the affidavits and supporting data submitted by the defendants, this court finds the rationale of *Keller* unanswerable, and the residency provisions in the two election plans under consideration unacceptable.

Because of the relief hereinafter provided, this court does not feel it appropriate or necessary at this time to reach the second contention advanced in "Edgefield County", that of racial discrimination, and, thus, purposely makes no finding on that issue in this Order.

Based on the foregoing, it is

ORDERED, in Civil Action No. 74-237 (*Lytle v. Commissioners of Election of Union County, et al.*), that summary judgment is hereby granted to the plaintiff, and the defendants therein are hereby enjoined from holding any further elections for Union County Township Commission pursuant to the residency provision contained in 338 South Carolina Joint Acts and Resolutions 555, as amended.

IT IS FURTHER ORDERED, in Civil Action No. 74-281 (*McCain, et al. v. Lybrand, et al.*), that summary judgment is hereby granted to the plaintiffs as to the first cause of action only, and defendants therein are hereby enjoined from holding any further elections for Edgefield County Council pursuant to the residency provision contained in § 14-1850 of the 1962 Code of Laws of South Carolina, as amended.

IT IS FURTHER ORDERED, that the primary and general elections for the year 1974 as provided by law for Union County Township Commission and Edgefield County Council shall be conducted with all candidates running at-large on a county-wide basis with no township or district resident requirement imposed on any candidate.

IT IS FURTHER ORDERED, that the defendants in each of the above entitled cases shall give public notice in a newspaper of general circulation in each county for a period of two weeks after receipt of this Order that any person wishing to file as a candidate for Union County Township Commission or Edgefield County Council under the terms of this Order shall have that right between twelve o'clock noon on June 3, 1974, and twelve o'clock noon on June 17, 1974, and the defendants herein shall make provision under applicable state law to accept such filings which might be made by any such candidates.

IT IS FURTHER ORDERED, to allow the defendants, if they be so advised, to seek reapportionment by

legislative enactment, with approval of the Attorney General of the United States under the 1965 Voting Rights Act, rather than reapportionment by court edict, that the defendants shall present to this court on or before May 1, 1975, a plan for election of the Union County Township Commission and the Edgefield County Council which has been adopted by the South Carolina General Assembly, and approved by the Attorney General of the United States.

IT IS FURTHER ORDERED, if no legislatively enacted plan, approved by the Attorney General of the United States, is presented to this court by May 1, 1975, by the defendants, that this court shall at that time put into effect its own reapportionment plan after receiving suggested plans from both plaintiffs and defendants.

IT IS FURTHER ORDERED, that this court shall retain jurisdiction in each of these actions until constitutionally valid reapportionment plans for the Union County Township Commission and the Edgefield County Council have been adopted by the defendants through legislative action, and approved by the Attorney General of the United States, and by this court, or until such time as this court devises and effectuates its own reapportionment plan, and such jurisdiction is retained in these cases for all appropriate purposes, including, but not limited to, the awarding of attorneys' fees to the successful parties if the same shall be proper in these circumstances.

/s/ SOL BLATT, JR.,
United States District Judge.

Charleston, South Carolina,
May 15, 1974.

TRUE COPY.
Test:

MILLER C. FOSTER, JR.,
Clerk.

/s/ MARGARET TRUESDALE,
By: Deputy Clerk.

Supreme Court, U. S.
FILED
SEP 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No. 75-1797

COMMISSIONERS OF ELECTION OF UNION COUNTY, et al.,

Petitioners,

versus

ROBERT LYTLE,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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Mauldin, South Carolina 29662
Attorney for Respondent

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BRIEF IN OPPOSITION TO CERTIORARI

The writ of certiorari should be denied because no issue worthy of review is presented by this case.

The case involves an award of attorneys' fees under the 1975 Voting Rights Act amendments, 42 U.S.C. § 1973 1(e). No question is raised of general importance to the administration of the Act, which has now been applied, consistently, by three circuits; the instant case (fourth circuit); *Torres v. Sachs*, —— F.2d —— (2d Cir. Jun. 25, 1976) (second circuit); and *Ferguson v. Winn Parish Police Jury*, 528 F.2d 592 (5th Cir. 1976) (Fifth Circuit). See also, *Wallace v. House*, 48 L.Ed. 191 (1976), in which a lower court judgment denying attorneys' fees in a voting case was vacated by this Court and remanded for reconsideration in light of the 1975 Voting Rights Act amendments.

The excruciatingly detailed description of the facts in the petition makes it clear that the petitioners simply have a quarrel with the outcome of this particular case and the way in which the court exercised its discretion. Specifically, the petitioners, who were defendants in a county reapportionment case, suffered an adverse judgment, which they allowed to become final. Thereafter, the district court awarded attorneys' fees to the plaintiffs as prevailing parties. The petitioners now seek to relitigate the reapportionment case on the merits to show that if they had not allowed the judgment to become final they would have been vindicated by a subsequent holding of this Court, and the plaintiffs would thus have ceased to be the prevailing parties.

The judgment on the merits of the county reapportionment case — which the petitioners now believe they should have won — was never set aside or modified. Despite the petitioners' statement that "after May 19, 1975, the petitioners on the record in this case would be entitled at any time to return to their prior reapportionment scheme," Petition, p. 7, they never made any effort (by motion or by new legislation) to restore the prior reapportionment scheme" or to undo the judgment which they now claim in retrospect they should have won. In short, the petitioners not only wish to change a judgment that they allowed to become final, but they wish to change it by a collateral attack.

But cases must come to an end and we all know cases which, in retrospect, we believe we could have won had we just taken another appeal or had the decision just come down a few days or weeks later. In *Class v. Norton*, 505 F.2d 123 (2d Cir. 1975), Connecticut claimed that a new decision of this Court should allow it to reopen an earlier order (requiring it to make certain payments) which it had allowed to become final. The second circuit said:

> "The efficient and fair administration of justice requires that litigation of an issue at some point comes to an end. And for the appellant, who has had one opportunity already to contest the payment order, the time to relitigate that issue has necessarily run." 505 F.2d at 125.

This unexceptionable principle was correctly applied by the fourth circuit in this case, in a unanimous decision by Judges Winter, Craven, and Widener. The appellees have had their opportunity to persuade three judges that in the specific circumstances of this particular case, the attorneys' fee award of $5000 should be set aside.* There is no issue in this case which would warrant requiring this Court to exercise its discretionary jurisdiction to review a case which was decided correctly and which is so devoid of general importance.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

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*Petitioners also quarrel with the fee award because of the defendants' official status. This case, of course, involves only a county redistricting, so eleventh amendment questions are wholly inapplicable. This Court has awarded and approved awards of attorneys' fees in situations just like this. *Bradley v. School Board*, 416 U.S. 696 (1974); *Northcross v. Board of Education*, 412 U.S. 427 (1973), and has awarded other taxable costs against local officials in hundreds of other cases. Moreover, Congress made its intentions on this point perfectly clear when it authorized attorneys' fees in voting cases:

> "As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are frequently state or local bodies of state or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official directly, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S.Rep. No. 94-295, 94th Cong. Ist Sess. 41 (1975), reprinted at 1975 U.S. Code Cong. & Adm. News 1492.